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UNBALANCED BIDDING IN GOVERNMENT CONTRACTS

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CHAPTER ONE

UNBALANCED OFFERS: AN OVERVIEW

This chapter presents a general overview of unbalanced offers in the Government procurement process focusing on how they are recognized and when they are unacceptable.

Subsequent chapters will examine in detail specific circumstances in which unbalanced bidding occurs. Currently employed reactions and remedies will be evaluated. Improved remedies will be proposed. Finally, specific performance issues involving unbalanced bidding will be analyzed.

In the course of procuring needed goods and services the Government agency will solicit offers from interested contractors. The solicitation may be requesting offers to perform a single or multi-year supply, service, or construction contract; a variable quantity service or supply contract, an option contract, or a single or multi-item supply contract. Regardless of the type of contract vehicle used by the agency, the goal is the same: to make award to the competitor whose offer is most advantageous to the Government.

The concept of "unbalancing" refers to the practice used by offerors to bid nominal prices for some work and enhanced prices for other work.[2] This practice enables contractors to either recover large sums for earlier performed work, circumvent statutory cost limitations applicable to certain types of work, or obtain a contract by taking advantage of a perceived faulty government estimate in contracts involving pricing variables.

The concept of "unbalancing" is not new. The earliest unbalanced bid cases were in the variable quantities arena where contractors attempted to take advantage of what they perceived to be a faulty government estimate of the quantity of materials required. In <u>Moffit, Hodgkins and Clarke Co. v. Rochester, 178 U.S. 373 (1900),</u> the Supreme Court, in its first and last encounter with this issue, defined unbalanced bidding as the situation where "the contractor will give a low price for one kind of work or materials in the same contract with the hope that the quantity of work and materials for which a low price is bid will be reduced, while the quantity of materials or work for which a high price is bid will be increased, thus making up on the high price bid sufficient to give the contractor a large profit upon the whole work."[3] In <u>Moffit</u> the City of Rochester had refused to allow a contractor who had submitted a high per cubic yard excavation bid for one tunnel and a very low per cubic yard excavation bid for another tunnel under the same contract to reform his bid. The Supreme Court agreed, holding that a contractor who submits a mathematically unbalanced bid in a variable quantity contract is betting that the government estimate is faulty. When that estimate turns out to be correct and the contractor sees that his bet was wrong he can't have another bite at the apple by obtaining relief through reformation. In Frank Stamato & Co. v.City of New Brunswick.[4], another early significant unbalanced bid case involving a contract for rock excavation on a per cubic yard basis, the court found the low bid acceptable even though it was substantially unbalanced. In what became the roots of the modern concept of unbalanced bidding, the court said:

> The mere fact that a bidder has submitted an unbalanced bid, does not automatically operate to invalidate an award of the contract to such bidder. There must be proof of collusion or of fraudulent conduct on the part of such bidder and the city or its engineer or other agent, or proof of other irregularity of such substantial nature as will operate to affect fair and competitive bidding.[5]

In the modern federal arena, because regulatory guidance concerning acceptance and evaluation of unbalanced bids is extremely limited,[6] Comptroller General decisions have become the primary source of law. The earliest CompGen opinion, citing Stamato above, applied the same test, to wit,... unbalanced bids would be countenanced where there exists no possibility of irregularity of such substantial nature as will operate to affect fair competitive bidding.[7] Refined by 30 years of experience, the approach generally taken today by the Comptroller General and widely adopted by the courts and boards allows acceptance of an unbalanced bid as long as it is not "materially unbalanced". In Jimmy's Appliance[8], the Comptroller General outlined the standard approach:

> Our office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Consequently, only a bid found to be materially unbalanced may not be accepted.

In applying the first, or "mathematical" prong of the test, it is necessary to find an actual imbalance in the bid. Thus the mere submission of a below-cost bid does not establish the existence of an unbalanced bid.[9] In Central Texas College[10] the awardee bid $26.80 for a 4 hour session of pre-testing, while the wage determination imposed a wage rate of $8.22 per hour. The Comptroller held that the existence of a low bid for one item is not enough to establish that the bid was unbalanced. The protestor would have to also allege that the awardee's bid was unreasonably high for other items. Similarly, in Porta-John Corporation[11], the fact that the awardee's bid for the most expensive item of performance was, in fact, the lowest of any item in his bid and 5 times lower than than next lowest bidder was not enough to establish that his bid was mathematically unbalanced because there was no allegation that he had enhanced his prices for other work. Another good example of a protest which was denied because the protestor didn't meet the "mathematical" prong of the test is <u>Impsa International, Inc. 86-1 CPD 506</u>[12], where the bids for the installation of turbines, governors, and generators in a hydroelectic project where as follows:

Installation Costs

	Government	Allis-Chalmers	Others
(1A) turbines	$1,800,000	$772,920	$1,350,000 - $3,794,000
(2A) governors	$180,000	$27,378	$167,000 - $308,691
(3A) generators	$530,000	$395,247	$820,000 - $1,916,000

The protestor argued that Allis-Chalmers' bid should be rejected as unbalanced because the firm's prices for installation represented only nominal prices. The Comptroller refused to find the bid mathematically unbalanced because the protestor had failed to establish that the firm also offered enhanced prices for the remaining bid items. Allis-Chalmers' bid prices for the actual equipment were 4th, 3rd, and 1st low. Thus in order to meet the "mathematical" prerequisite to a finding of unbalanced bidding, the bid must contain both nominal prices for some units as well as enhanced prices for other units.

Once a bid has been found to be mathematically unbalanced, the "material" aspect of unbalancing comes into play. The widely accepted test for material unbalancing involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.[13] The "reasonable doubt" test reflects the long-held view that unbalanced bidding may give rise to irregularities of such a substantial nature that fair and competitive bidding will be affected, but it is a factual determination which varies depending on the particular circumstances of each procurement.[14] Thus in a trash service contract which contained a 3-month base period and three 1-year options, a mathematically unbalanced bid was properly accepted as offering the lowest ultimate cost to the Government where the Air Force had a known requirement for the trash service and was reasonaly certain funds would be available to exercise the options even though the bid didn't become low until after 15 months of performance and the price of the 1st option period was 100% higher than the prices for the 2nd or 3rd option periods.[15] By contrast, in <u>Howell Construction, Inc.</u>[16], the Comptroller upheld the agency's determination that a mathematically unbalanced bid was also materially unbalanced. <u>Howell</u> involved a painting contract at Keesler Air Force Base which containted a 5-month base period and two 1-year options. The mathematically unbalanced bid was 85% higher for the 1st option year than for the 2nd and the bid did not become low until after the 21st month of performance.[17]

Material unbalancing is most often found in situations where the solicitation contains pricing variables such as the option periods contained in the previous examples, or estimated quantities. In <u>SMC Information Systems</u>[18], SMC's bid was improperly rejected as materially unbalanced when the Comptroller found that although the bid contained skewed prices for various labor categories, the accuracy of the IFB's estimate of the anticipated quantity of work was not questioned and hence SMC's evaluated cost was as accurate an indicator of the ultimate cost to the government as the other offeror's evaluated costs.[19] The Comptroller has expressed his belief that it would be very difficult for a protestor to carry the "reasonable doubt" burden in a fixed price, definite quantity contract.[20] Thus ten years ago, in <u>M&B Contracting Company</u>[21], the Comptroller supported the agency's acceptance of a materially unbalanced bid on a fixed price 3-year waterway construction project. The low bidder had included the cost of $5 million worth of new equipment in his mobilization and preparatory costs and then drastically reduced the amount bid for excavation. The Comptroller dismissed as "speculative", the protestor's argument that this extreme front end loading was tantamount to an advance payment and that if the Government terminated before completion, the Government would have purchased a huge fleet of equipment for the contractor.[22] This provides an interesting contrast with a developing area of unbalanced bid law pertaining to first articles in supply contracts. Recent Comptroller decisions have found that even if a bid meets the "reasonable doubt" test, if it is grossly mathematically unbalanced the bid is materially unbalanced per se.[23] The reason given by the Comptroller is that acceptance of such a bid would be akin to an advance payment. Award would provide funds to the contractor early in contract performance to which it is not entitled if payment is to be measured on the basis of value received. This new alternative test will be discussed in detail in Chapter Two of this paper.

The chapters which follow will focus on unbalanced bidding in the specific circumstances in which it occurs, evaluate current remedies, explore new ones, and discuss performance issues associated with unbalanced bidding.

CHAPTER TWO

MULTI-ITEM PROCUREMENTS

One of the most troublesome areas involving unbalanced bidding is in multi-item procurements. This chapter will discuss several kinds of multi-item procurements susceptible to unbalanced bidding as well as possible solutions.

A. First Article Pricing

Many supply contracts require a contractor to submit samples of non-commercial items manufactured to government specifications for testing and approval prior to commencement of production. Since significant costs are incurred at the beginning of contract performance for the purchase of special tooling and equipment which will be used to produce the first articles, particularly by contractors which have never manufactured the particular item before, it is a common practice to solicit separate bid prices for the first article units and for the production units. First article prices are typically expected to be much higher than the production unit prices. Bidders frequently seek to take advantage of the government's expectation that the first article price will be much higher than the price for production units by inflating first article prices to include not only special tooling and start up costs attributable to the first articles, but also production costs for the production units as well. The risk to the Government arises in a situation where a contract which is first article front-end loaded is terminated after first article testing. The Government would have paid an exorbitant price for the first article test units and the contractor would get a windfall. If, on the other hand, the contractor does not pass first article testing and the contract is terminated for default, the Government's risk is minimized because it has no duty to pay the contract price for units not accepted and can also collect excess reprocurements costs from the defaulted contractor.[24]

Traditionally the Comptroller General employed the traditional 2-step (mathematical & material) analysis in First article unbalanced bid cases.[25] Thus even though a contractor's bid may have been mathematically unbalanced in that the first article carried a disproportionate share of the price, the bid could still be accepted unless there was reasonable doubt that in the context of the particular procurement that award would result in the lowest ultimate cost to the government. Since most first article cases involve a definite quantity of production units, as long as the contractor completed the contract and delivered all the units, under the traditional analysis the government would still receive the ultimate lowest price even where the first article price was grossly unbalanced. Thus the "material" element of the test was difficult to fail under the traditional analysis.

Beginning in 1985 the Comptroller General began taking a harder line with regard to unbalanced first article bids. Three significant 1st article Army cases were decided which resulted in the definition of "material" being expanded to also include cases where the bid was "grossly mathematically unbalanced". The first such case was Riverport Industries, Inc., in which the GAO sustained a protest against an Army award of a contract for TOW missile overpacks.[26] In Riverport, the low overall bidder assigned a price of $185,000 to each of two first article units, and a price of $14.07 to each of the 38,431 production units. By contrast, other bidders assigned prices to their first articles ranging from zero to $1,000 each. The first article price was over 40% of the total bid price and the bid was "completely out of line with the pricing structure of the four other bids submitted".27 The price differential between the first article and production units was more than 13,000 to 1. Since the first article price was grossly unbalanced the GAO felt that acceptance of such a bid would be tantamount to granting the contractor an advance payment which is generally prohibited by 31 USC 3324. Since the contract had already been awarded and costs incurred, however, the GAO did not recommend specific remedial action but cautioned the Army to be wary of such situations in the future. The second case in the trilogy was Edgewater Machine & Fabricators, Inc.[28] In Edgewater, the low offeror set the price for six first article shipping containers at a total of $750,000 representing 25% of its total offer. Production units were priced at $301 each. Thus the differential between the first article and production units was over 415 to 1. Interestingly, the low offeror's price with the first articles was only $6,100 more than its alternative offer should the first article requirement be waived. The Comptroller General sustained the protest because the first article price was grossly unbalanced and bore no reasonable relationship to its cost, but was merely a device to obtain unauthorized contract financing. The third case, Nebraska AluminumCastings, Inc.[29], involved an Army solicitation for hand held magnetic compasses which went out before the Edgewater decision was issued. The IFB called for delivery of 100,002 production units over a two year period, with an additional 10 first article units to be ready for approval testing 150 days after contract award. The incumbent contractor bid $12,224 for the 10 first article units, and $2,197,044 for the production units, for a total contract price of $2,209,268. Nebraska, who wanted to become a second source for these items but faced substantial special tooling and equipment costs, bid $225,100 for the first articles and $1,917,038 for the production units, for a total bid price of $2,142,138. Nebraska was clearly the overall low bidder. The Army declared Nebraska to be non-responsive and made award to the incumbent. The GAO denied Nebraska's protest, finding their bid to be per se materially unbalanced because their first article price exceeded the production unit price by a ratio of 1000 to 1.

The new Riverport-Edgewater-Nebraska doctrine could thus be summarized as follows:

> When a first article price is so egregiously front-loaded that it can be considered merely a bidding scheme to obtain otherwise unauthorized advance contract financing, it will be deemed materially unbalanced per se and will be rejected even though the bid is clearly low overall.

The parameters of this new doctrine are still not clearly established. How much unbalancing is necessary in order to be "grossly" unbalanced? A recent GAO decision is helpful in shedding some light on this issue. In Microtech, Inc.[30], also an Army case, the Comptroller General explained that "in assessing whether or not a first article price is egregiously front-loaded, this office will look to see if there is a significant difference in the scope and nature of the work required to produce the first article on the one hand and the production items of the other".[31] Thus, a mere first article unit to production unit ratio test is inadequate to determine if the bid is per se materially unbalanced. In Microtech, the Army's rejection of the unbalanced bid was sustained even though the price differential between first article units and production units was merely 8 to 1 because the first article units were simply initial samples identical to the production units which, after successful testing, would constitute part of the first production lot. Thus we see that where the first article units are essentially identical to production units, with little extra effort required, a relatively small amount of unbalancing will be allowed. It can be assumed that the converse is also true.

B. Variable Quantity Contracts

Variable quantity contracts have long provided fertile ground for the development of unbalanced bid problems.[33] These are multi-item contracts where, due to uncertainties as to actual requirements or funds available, the government provides estimated quantity requirements in the solicitation. Offerors submit bids on a unit price basis with award going to the lowest overall bid as determined by multiplying the bidder's unit price by the government's estimated quantities. Because the Government estimates are often inaccurate, contractors are able to game the system by bidding low on those items the quantity of which was overestimated in the Government estimate while bidding high on those items the quantity of which was underestimated in the Government estimate. The traditional 2-step test (mathematical & material) is applied in this area. First, the bid must be evaluated mathematically to determine whether it is unbalanced. This evaluation focuses upon whether each bid item carries its share of the cost of work and of the contractor's profit or whether the bid is based upon nominal prices for some work and enhanced prices for other work. Second, if found to be mathematically unbalanced, an assessment must be made of the cost impact of that bid, that is, whether the bid is materially unbalanced. Unless there is a reasonable doubt that the award will result in the lowest ultimate cost to the government or there is evidence of some irregularity of such substantial nature as will affect the competitive bidding system, the bid should not be considered materially unbalanced.[34] A good example of a materially unbalanced bid which was rejected as being non-responsive is contained in Asphalt Service,Co.[35], a 1987 Comp Gen decision. In Asphalt, bidders were required to provide unit prices per ton and a total price for each item based on an estimated tonnage of asphalt for 14 sites in a National Forest. In addition, the IFB required bidders to provide a price per hour for excess spread time, that is, standby time incurred in the delivery of the asphalt. The IFB stated that for evaluation purposes 3 hours excess spread time would be added to each bid item, but that 3 hours was not a guaranteed figure. Asphalt knew that in prior years the spread time had been averaging around 39 hours instead of the 3 hours contained in the solicitation. It therefore unbalanced its bid, lowering its prices on the other items so as to be the low bidder, and inflating its price to $400 per hour for the excess spread time. The competitor's bid for excess spread time was $65 per hour and Asphalt itself had bid $70 per hour the previous year. The Forest Service concluded that there was substantial doubt that Asphalt's bid would result in the lowest ultimate cost to the government. They rejected Asphalt's bid as materially unbalanced. The Comptroller sustained the rejection, stating that since it was apparent that Asphalt submitted an unbalanced bid to take advantage of the faulty government estimate, its bid was properly rejected.[36]

Challenges to the validity of government estimates by disappointed bidders have generally been unsuccessful because the GAO requires only that estimated quantities be reasonably accurate representations of anticipated actual needs.[37]. Thus a protestor challenging an agency's estimate bears the burden of proving that these estimates are not based on the best available information, otherwise misrepresent the agency's needs, or result from fraud or bad faith.[38] Thus unless the agency itself decides that its estimate is faulty and resulted in receipt of unbalanced bids, it is difficult for a disappointed bidder to win a protest on the basis of an unbalanced bid in a variable quantity contract. The Government is in a "Catch-22" situation. On the one hand it pays more than necessary for required goods and services because its estimates are often faulty, while on the other hand it seeks to maintain a great degree of latitude with regard to the accuracy of its estimates. Perhaps its time to bite the bullet and take greater precautions to insure that Government estimates are as accurate as is reasonably possible under the circumstances.

One area where the Government has gotten into trouble in the variable quantity arena is when the evaluation scheme encourages unbalanced bidding by neglecting to give estimates of line item quantites or by evaluating offers on an aggregate basis without considering the line item quantity estimates given. Thus in Reliable Reproductions, Inc.[39], the Comptroller General found cancellation of the solicitation proper where it did not include quantities for each line item and would have resulted in evaluation based on aggregate line item prices. The solicitation called for bids to provide specified reproduction services. The schedule contained fourteen separate line items which were unweighted as far as quantities to be ordered during actual contract performance. Award was made by simply totaling the prices received from each bidder for the fourteen unweighted line items. The Comptroller found that the solicitation encouraged unbalanced bidding, especially in light of the fact that the agency had historically purchased significant quantities of some items and few quantities of other items.[40]

C. Solutions in the Multi-item Arena

1. Comptroller General

The CompGen's approach in these cases has been to reject a bid which is materially unbalanced unless he can avoid the "material" issue by finding that the solicitation somehow encouraged unbalanced bidding in which case he will recommend cancellation and resolicitation. Recent examples of this can be seen in M.C. General, Inc.[41], where the Comptroller found a bid in which the first article unit prices were approximately 15 and 17 times greater than the unit prices for the respective production items was properly rejected as materially unbalanced; and also in Price Brothers Co.[42], where the Comptroller recommend cancellation of a solicitation where the low bidder had unbalanced his first article unit prices by ratios of 6 to 1 and 8 to 1. The Comptroller found the solicitation defective because the stated evaluation scheme was based on the lowest price for the Government's best estimated quantities (BEQ) of the items to be procured. The Air Force could actually purchase a higher amount, the BEQ amount, or a specified minimum amount. The Comp Gen said this scheme encouraged unbalanced bidding because the contractor was forced to either amortize its costs over units the Air Force might or might not procure, or place all of its costs in its first article price. The

Comptroller's analysis ignores the fact, however, that the bidder could amortize its costs over the minimum production quantities as well as the first articles. It appears likely that the Comptroller was stretching to find a defect in the solicitation in order to cancel it thereby avoiding the issue of whether the low offeror's bid was materially unbalanced or not. The "material" issue would have been particularly difficult in light of the fact that the next low bid was over $3 million higher. This case reflects the uncertainty which still exists as to the parameters of the GAO's unbalanced bid doctrine.

2. Federal Agencies

The procuring agencies have reacted to the Riverport-Edgewater-Nebraska line of decisions by seeking to heap on more regulatory guidance. The DAR Council is considering changes to the Federal Acquistion Regulation (FAR) dealing with unbalanced first article pricing.[43] First, FAR 9.306(d) would be amended to require that offers for contracts requiring first article testing include prices both with and without first article testing. Secondly, a new solicitation provision would be added to FAR part 52 which requires proper allocation of costs solely attributable to first articles, and unit price integrity. This clause also states that bids that are materially unbalanced will be rejected and reserves to the Government the right to request first article cost data. Thirdly, FAR 15.805-2, which deals with price analysis, would be expanded in an attempt to codify the legal analysis employed by the Comptroller General in the Riverport-Edgewater -Nebraska line of decisions. The new FAR 15.805-2 (b) would read as follows:

> The contracting officer is responsible for determining whether offers for contracts requiring first article testing are unbalanced: that is, whether there is a proper relationship between the price for the first articles and the price for the non-first article items. An offer may be unbalanced in two ways: mathematically and materially. An offer is mathematically unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated for other work. A bid that is mathematically unbalanced may also be materially unbalanced if, for example, there is a reasonable doubt that award would result in the lowest ultimate cost of the Government. An offer may also be materially unbalanced if it is so grossly unbalanced

mathematically that its acceptance would be tantamount to allowing an advance payment. One or more of the following tests may be used to determine if an offer is mathematically and materially unbalanced:

(1) Whether all offers have a higher price for the first articles than for the non-first article items.

(2) Comparison of the range of prices for first articles from all offerors.

(3) Relationship of first article prices to non-first article prices, and how much greater first article item prices are than non-first article prices.

(4) Percentage of price for first articles to total contract price.

(5) How much the first

articles will cost the offeror (recurring and non-recurring costs), and how that cost is distributed between the first article items and the non-first article items. The cost to the offeror for first articles may be estimated by comparing the total price offered with first article to that offered without first article.

D. Analysis of Current Remedies

In going beyond the traditional 2 step analysis by creating a new body of law dealing with grossly or egregiously mathematically unbalanced bids which are "per se" materially unbalanced, the Comptroller General has added unnecessary complications to an already murky area. His analysis for determining whether a bid is materially unbalanced is workable in cases in which the bid is either clearly balanced or clearly unbalanced. But for cases which are in the gray area the contracting officer is left to rely on his instincts (which is some cases may yield better results than trying to apply the GAO's overly mechanical analysis). The Price Brothers[44] case is a good example of this. In Price Brothers the Comptroller spent a good deal of time going through the Riverport-Edegwater-Nebraska line of cases dealing with unbalanced bidding only to stop short of determining the issue by taking safe haven in calling the solicitation defective because it purportedly encouraged unbalanced bidding.

In their proposed changes to the FAR the agencies have done a good job of capturing the Comptroller General's new "grossly unbalanced" analysis. The question becomes however, now that we've got the analysis, is it any good, and do we really want to go where this road is leading us? Line drawing is no easy task. Attempting to articulate an all-encompassing definition of material unbalancing raises a dilemma similar to that faced by the late Justice Stewart of the United States Supreme Court, who said of hard-core pornography that he probably could not define it, but, "I know it when I see it".[45] In addition to the problem of attempting to draw a line between bids that are unbalanced but ok and bids that are unbalanced but not ok, an even bigger question must be answered. This requires stepping back from the trees for a moment to look at the forest. Is it really in the Government's best interest to reject unbalanced bids at all? After all, what we are talking about here is rejecting low bidders! In some cases, even though under the

GAO analysis the bid is grossly unbalanced, the Government has lost money by rejecting it. In the Riverport[46] case, GAO concluded that it was implausible that the low bidder's first articles were worth anything like $370,000 and that his bid should therefore be rejected as grossly unbalanced. Rejecting the low bidder in favor of Riverport's would have resulted in an increase of $112,424.74 in cost to the Government. Even if you considered the entire $370,000 worth of FAT costs proposed by the low bidder to be an advance payment and applied an interest rate of 10%, it would take over 3 years before the $112,000 increase in cost was recovered. This case points up the fact that the remedy of rejection of the low bidder is not the best answer in many cases. The Government winds up paying higher prices for needed goods ands services in an era when we can least afford it.

The value of the additional FAR changes proposed by the agencies dealing with submission of cost and pricing data is outweighed by the additional costs which would be involved. The proposed provision would allow the Government to require submission of cost or pricing data under sealed bid procurements, thus transforming what was designed to be a simple, inexpensive method of procurement into an expensive process. Contractors will either pass along the increased expense of these accounting requirements to the Government in the form of higher prices, or they may refuse to bid on contracts subject to the requirement, thereby decreasing competition. The provision calling for submission of alternative offers, with and without FAT pricing, and first article unit price integrity would be useful additions to the current FAR 9.306 which permits but does not allow the contracting officer to require the submission of alternative offers.

E. Recommended Remedy: Single Percentage Factor Method

Over 12 years ago, the Comptroller General upheld a single percentage factor method of bidding which virtually precludes unbalanced bidding in multi-item contracts.[47] In that case the IFB was for a requirements type, one-year contract, which involved removing and installing various types of partitions and related tasks in Government buildings. The Government's requirements consisted of a schedule of 36 separate job descriptions so as to permit issuance of orders for the work actually to be done when the need arises. The IFB specified for each item a unit price which had been predetermined by GSA and bidders were to submit a single plus or minus percentage factor to be applied to the unit prices in the schedule which would then be applied to every work order. Award was made to the bidder offering the net or percentage factor which would produce the lowest unit prices for the line items.[48] The Comptroller gave his stamp of approval to this bidding system, saying "the system has the virtue of of preventing the deliberate unbalancing of prices by a bidder where he has reason to believe that the proportion of item quantities projected is substantially wrong with the result that a bid evaluated low will in fact result in a higher cost to the Government than would have been the case under a bid evaluated higher."[49]

Single percentage factor bidding would alleviate the problems encountered today by the GAO in trying to define a materially unbalanced bid. It would be unnecessary to attempt to draw a line between the unbalanced but acceptable and the unbalanced and unacceptable. Contractors would no longer be able to game the system by grossly front loading their bids or taking advantage of what they perceived to be a faulty government estimate. Single percentage factor bidding could also be helpful in first article test unit cases. Contracting officers could require that first article test costs be amortized over all first article and production units and then a single percentage factor bid be submitted for the average unit cost. Contracting officers would still be free to require alternate percentage factor bids, with and without FAT costs in order to see what effect first article testing would have on the overall contract price.

I recommend use of this system as the best remedy for unbalanced bidding in the multi-item arena.

F. Miscellaneous Unbalanced Bidding Issues in Multi-Item Procurements

1. Skewed Bidding in Timber Sales Contracts

Timber is sold from the National Forest System to private concerns through a system of competitive bidding where, instead of making award to the low bidder, award goes to the high bidder. The problem arises however, in that timber sales often include more than one species of timber. Because bids have historically been offered by species, and the high bid for the sale is determined by adding the totals for the price bid for each species multiplied by the estimated timber volume of that species.[50] Skewed bidding occurs where bidders bid a high price for a species whose volume is overestimated and low prices for species whose volumes are underestimated. They thereby end up paying less than the total amount bid for the timber sale.[51] Of the 3,577 timber sales in three western regions occuring during 1980 and 1981, 755 or 21% were awarded to purchasers submitting a skewed bid. From those 755 contracts the Forest Service lost an estimated $1.9 million due to skewed bids.[52]

In order to remedy their skewed bid problem (which is very similiar to a an unbalanced bid in a variable quantity contract) the Forest Service is in the process of implementing a new bidding system which is very similar to the percentage factor bidding system discussed above as a remedy for unbalanced bidding in multi-item contracts.[53] Under the new system a bidder would bid a single bid premium, which is the amount bid above the advertised Forest Service rates. The single bid premium would be bid for the entire volume of timber to be sold. The contract would be awarded to the bidder with the highest overall price calculated by multiplying the single premium by the estimated quantities of each species to be sold. The GAO recommended adoption of this system because it would provide much less leeway for bidders to manipulate the bidding process to the Government's disadvantage and would eliminate the possibility of skewed bidding.[54]

2. Circumvention of Buy American Act Preferences

An interesting variation of unbalanced bidding in the multi-item area involves the attempt to "game" the application of Buy American Act[55] preferences. The Act requires that when a bid or offer contains a foreign end product, a differential equal to 6 percent of its bid price be added to the bid for evaluation purposes.[56] This differential, however, is not added to the price of assembly and installation of the foreign end product which is done in the United States. Hence, there is a temptation to enhance the price of the line item for installation and decrease the price of the line item for the actual equipment. In Allis-Chalmers Corporation,[57] the Protestor argued that the foreign competitor had unbalanced his bid in just that way. In response to an IFB for a fixed price contract to design, manufacture, and install turbines in the Amistad Dam Powerplant on the Rio Grande river, Allis-Chalmers submitted a total bid price of $4,005,800 which, after subtraction of an amount for testing costs and a 1-percent discount, was evaluated at $3,768,979.50. Hitachi bid $3,400,000, which was evaluated in the following manner:

$3,400,000	-	Total Bid Price
- 999,500	-	Price for Installation (line items 17 & 18)
2,400,450		
x .06	-	BAA Differential
144,027		
+2,400,450		
2,544,477		
+ 60,000	-	Foreign Inspection
+ 999,500	-	Line items 17 & 18

$3,604,027 - Evaluated Price

Under this method of evaluation, Hatachi was the low bidder by $164,952.50. Allis-Chalmers unsuccessfully argued that Hitachi had unbalanced the price of the line items for installation in order to obtain the award and that exclusion of installation and assembly costs from the differential encourages foreign bidders to submit unbalanced bids whenever final assembly and installation of the end product is in the United States so that they may minimize the effect of the Buy American differential.[58] The Comptroller General denied the protest, finding that Allis-Chalmers had produced no evidence showing that Hitachi's bid was unbalanced, and went on to say that "the rule that materially unbalanced bids must be rejected,...in combination with the ability of the agency to detect a materially unbalanced bid by comparing other bids and its own estimates, will sufficiently deter unbalanced bidding."[59]

It is interesting to note, however, that while the Comptroller indicates that unbalanced bid analysis would be applicable to this situation,the commonly used second prong of the test to determine material unbalancing would be useless here. That test focuses on whether there is reasonable doubt that the award to the party making the unbalanced bid will result in the lowest ultimate cost to the government. Since the low bidder will provide the lowest cost to the government regardless of whether he has unbalanced his U.S. assembly and installation costs, an unbalanced bid would never be materially unbalanced under that analysis. The Comptroller General must have had another test in mind in referring to unbalanced bid analysis in Allis-Chalmers.

3. Circumvention of Statutory Cost Limitations

Another closely related area where unbalanced bidding comes into play involves statutory cost limitations. The landmark case in this area is Chrysler Corporation[60], decided in 1975. In Chrysler, the GSA solcitation for automobiles contained a statutory limitation of $2,100 for sedans and $2,400 for wagons. Additional equipment, however, was not subject to that cost limitation. Chrysler's bid met the statutory cost limitations by unbalancing its price for the additional equipment versus the automobiles. The bid price for the additional equipment on each auto totaled $1,169.00, compared to the dealer's net cost of $471.34 and a suggested retail price of $592.65.[61] The General Services Administration rejected Chrysler's bid because it "was materially unbalanced so as to constitute a circumvention of the statutory price limitation for passenger motor vehicles."[62] The Comptroller General denied Chryler's protest, finding the bid non-resposive while having difficulty in fitting this case into the common two-prong unbalanced bid analytical framework.

The case of ABC Siding & Remodeling[63], decided in 1984 is also illustrative in the area. This was an Air Force contract for construction and repair of a base administration building at Malmstrom Air Force Base, Montana. The solicitation contained a $200,000 statutory cost limitation for the construction phase of the project. Three bids were received as follows:

Company	Construction Item 1	Repair Item 2
ABC	$224,149	$56,954
Garrett-Heikens	197,314	93,460
Dick Olson	192,880	105,000

The solicition also contained DAR clause 7-2003.27 which specified that bids may be rejected which have been materially unbalanced for the purpose of bringing affected items within cost limitations.[64] ABC contented that Garrett-Heikens' bid should be denied because it was materially unbalanced in order to circumvent the statutory cost limitation. The Air Force was able to convince the Comptroller, however, that even if the successful bidder's bid was mathematically unbalanced, because there was no doubt that the award would result in the lowest ultimate cost to the government, the bid could not be materially unbalanced.[65] The Comptroller General denied ABC's protest finding no evidence that Garrett-Heikens had enhanced Item 2 of his bid in order to circumvent the cost limitation. Again, the GAO exhibited uneasiness with the concept of unbalanced bidding in this situation, finding that the materially unbalanced prong of the test (ie. reasonable doubt that award will result in the lowest ultimate cost to the government) could never be met in this type of case.[66]

As a result of the Comp Gen's uneasiness in applying the unbalanced bid two-prong test to statutory cost limitation cases, some have questioned whether Chyrsler or ABC should be considered unbalanced bid cases at all.[67] What these individuals,as well as the Comptroller General, have forgotten, however, is that since the origin of unbalanced bid common law there has been an alternate second prong of the test. In Frank Stamato[68], decided in 1952, the court outlined the test for material unbalancing as whether there was a substantial irregularity which would affect the integrity of the competitive bidding process. This test has been recognized by the Comptroller in recent cases, including Oswald Brothers Enterprizes, Inc. where he stated:

> Our office has recognized the two-fold nature of bid unbalancing. First, the bid must be evaluated mathematically to determine whether it is

unbalanced. ...Second, if found to be mathematically unbalanced, an assessment must be made of the cost impact of that bid. Unless there is a reasonable doubt that, by making the award to the party submitting the mathematically unbalanced bid, the award will not result in the lowest ultimate cost to the government OR evidence of some irregularity of such substantial nature as will affect the competitive bidding system, the bid should not be considered materially unbalanced.[69]

It is likely the Comptroller had this alternative "substantial irregularity" test in mind when, in discussing circumvention of the Buy American Act preferences in the Allis-Chalmers[70], he plainly inferred that rules in existence would prevent unbalanced bidding in that situation.[71] The "substantial irregularity test" would be equally applicable to the closely related area of circumvention of statutory cost limitations. The use of unbalanced bidding to circumvent these limitations would appear to be the kind of irregularity which would undermine the competitive bidding process and make the bid materially unbalanced. Existing unbalanced bid analysis therefore covers this situation. It is not an aberation nor a new standard. The Comptroller General can therefore shed his uneasiness with applying unbalanced bid analysis in these cases.

CHAPTER THREE

THE MULTI-PERIOD ARENA

As opposed to the previous chapter which discussed unbalanced bidding in the multi-item context, this chapter will focus on unbalanced bidding in the multi-period arena, with major emphasis on option contracts which contain the highest incidence of unbalanced bidding. Although options can be for additional quantities of supplies as well as additional periods of performance, the option will generally be exercised and performed during a future time period. Hence, options will be discussed in this chapter which deals with unbalanced bidding in the multi-period arena. The other area covered by this chapter will be multi-year contracts. With regard to both options and multi-year contracts, this chapter will include an analysis of unbalanced bid problems and current remedies and then suggest some improved remedies for dealing with unbalanced bidding in the multi-period arena.

A. OPTION CONTRACTS

1. Introduction

Option contracts which obtain firm commitments for additional quantities or services from contractors yet pose no binding obligation on the government are widely used in public contracting. Covered by the provisions of FAR Part 17, their use is generally appropriate except in situations where there is a known firm requirement for which funds are available[72] or where adequate competition can be obtained when the future requirements are defined.[73]

2. Evaluation of Option Periods

An important factor in this area is whether the option periods will be evaluated at the time of award of the basic contract. If the option quantites are included in the evaluation, the bidders will have the incentive to offer competitive prices but may be tempted to unbalance the prices between the option periods so as to give them a higher return up front and lead to unnecessarily higher prices for the government if the later years' requirements don't materialize. If, on the other hand, the option periods are not included in the original evaluation, contractors may be inclined to enhance option prices in hopes that the government will find it necessary to exercise the options.[74] FAR 17. 206 specifies that except when it is determined not to be in the Government's best interest, the option periods should be evaluated at the time of award of the basic contract. It requires a written determination at a level above the contracting officer in order not to evaluate option periods at the time of the basic award.[75]

a. Options not evaluated

Even though it will be in the exceptional case that the option periods are not evaluated at the time of the basic award, what happens when the government decides for legitimate reasons (ie. it is highly unlikely the options will be excercised) not to evaluate the options at the time of award? The FAR gives no guidance on how to deal with unbalanced option prices where the option periods or quantities are not evaluated. Formerlly, under the R & R Inventory Service case [76] decided in 1974, it was believed that significantly high unevaluated option prices, as compared to basic quantity prices, was not a sufficient reason to reject the bid. Thus in R & R the protest was denied even though the low bidder's prices for the second and third year options which were not evaluated were 700 to 900 percent more than basic quantity prices. The Comptroller General reasoned that since there was no guarantee the options would be exercised and the contracting officer was required to make a determination that the option was the most advantageous method of fulfilling the government's requirements before exercise, there was not a sufficient reason to reject the low bid.[77]

In recent years the practice of ignoring the unbalanced nature of option prices has been somewhat mitigated by the Claims Court's decision in Gracon Corp. v. United States[78] This case involved a solicitation by the Army Corps of Engineers requiring a bid price for the dismantlement of 17 Titan II Silos at McConnell Air Force Base, Kansas and also an option price covering one additional silo. The solicitation stated that award would be determined by evaluating only the basic work exclusive of options. A clause which allowed rejection of unbalanced bids was also incorporated by reference. The five lowest bids for the basic work were as follows:[79]

	Basic	Option
Western States	$4,690,000	$1,190,000
GRACON	5,090,000	320,000
Martin K. Eby	5,600,000	363,000
Hawkins	5,095,000	388,000
Sherwood	6,366,500	374,500

Award was made to Western States. Gracon protested on the grounds that Westerns' bid was materially unbalanced. The Court held that the contracting officer had discretion to accept or reject the bid which contained the unbalanced option prices in accordance with the solicitation clause permitting the rejection of materially unbalanced bids.[80] Absent a solicitation clause allowing rejection of unbalanced bids in nonevaluation of options cases, the Contracting Officer would have difficulty rejecting such a bid as non-responsive.

b. Options Evaluated

In most cases the option periods will be evaluated at the time of initial award but will not be exercised until a future period of time. Under these circumstances FAR 17.208 provides that, as long as there is a reasonable likelihood that the option will be exercised, the following provision will be inserted in the solicitation:

> The Government may reject an offer as being nonresponsive if it is materially unbalanced as to prices for the basic requirement and the option quantities. An offer is unbalanced when it is based on prices significantly less than cost for some work and prices which are signficantly overstated for other work. [81]

Hence, in the majority of unbalanced option cases, the contracting officer has the clear authority to reject a materially unbalanced bid. The focus is therefore on when a bid containing unbalanced option prices becomes "materially" unbalanced.

3. Determining Whether a Bid is Unbalanced

Since the regulations give no guidance as to what constitutes a materially unbalanced bid when option periods are involved, the Comptroller General's decisions must be used to ascertain the applicable rules in this important area. The Comptroller applies the traditional two-step analysis discussed in earlier chapters in this area. Under this analysis the contracting officer must first decide whether a bid is mathematically unbalanced, that is, does each bid item carry its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second step involves a determination of whether the mathematically unbalanced bid is also materially unbalanced. This involves an assessment of the cost impact of the mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.[32] This two-prong test is illustrated in the case of <u>USA Pro Company, Inc.</u>[33] In response to a solicitation for painting services at Vandenberg Air Force Base, California which was to be performed for a base year with a possibility of two additional 1-year options, USA submitted the following bid:

Base Year	1st Option	2nd Option
$1,521,712	$1,558,643	$800,784

The Government estimate for the work was as follows:

Base Year	1st Option	2nd Option

$1,427,131	$1,547,431	$1,619,113

The next low bid was as follows:

Base Year	1st Option	2nd Option
$1,460,668	$1,558,507	$1,604,982

The Air Force rejected USA's bid. They determined the bid was mathematically unbalanced since both the government's estimate and the other commercial bids showed successive price increases in the option years, principally due to the expectation of increased labor rates in those years. It was determined to be materially unbalanced because there was reasonable doubt that the 2nd option would be exercised which would mean there was a good chance the government wouldn't end up getting the lowest price.[34] USA protested. The Comptroller General agreed with the Air Force, finding that the mathematical unbalancing in the bid prevented it from becoming low until the final option period as to which there was a reasonable doubt that it would be exercised.[35]

a. Mathematical Unbalancing

The fact that base and option year prices differ significantly does not automatically make the bid unbalanced. The case of Roan Corporation[36], decided by the Comptroller in 1984 is a good example. The case involved a solicitation by the U.S. Marshal's Service (Justice) for the rental of 358 police cars for 1 year plus 2 additional option years. Option period prices were evaluated at the time of initial award. The following bids were submitted:

(monthly lease charge per car)

	Base Year	1st Option	2nd Option	Total
Roan	604	36	36	$2,612,064
Crown	446	146	138	$2,820,720
Avis	344	344	344	$3,987,648
Carter	736	302	139	$4,547,926

Justice awarded the contract to Avis, finding the other bids mathematically and materially unbalanced. Roan protested. The Comptroller General sustained Roan's protest, finding that their bid was not mathematically unbalanced despite the fact that Roan would recover 89 percent of the total contract price in the base year.[57] The heavy front-loading was justified by the heavy startup costs that actually would be incurred in supplying the cars for lease. Roan had to buy the cars for $10,096.00 each and had no further costs since the maintenance was to be provided by the government. The Comptroller General also found it significant that Roan would have no use for the cars after the end of the contract.[58] The "magic words" used by the Comp Gen in these cases when he is looking at whether a bid is mathematically unbalanced are whether the bidder will obtain a "windfall" if all options are not exercised. In this case, he concluded that

Roan's bid was not mathematically unbalanced because Roan would not obtain a windfall if all options were not exercised.[89]

Another interesting case, decided also in 1984, involved a request to the GAO by the United States District Court for the Northern District of California for an opinion about whether a bid was mathematically unbalanced. In the case of Integrity Management International, Inc.[90] the Army had solicited bids for laundry services for a base year plus up to 2 additional option years. The solicitation contained the standard clause discussed earlier which warns bidders that a materially unbalanced bid may be rejected. The two bids relevant to the protest were as follows:

	Base Year	1st Option	2nd Option	Total
IMI	$590,706	$511,448	$513,616	$1,615,772
EC	$565,624	$529,624	$529.624	$1,624,872

The Army rejected IMI's bid, finding it mathematically unbalanced although it's base year price was just 15 percent higher than either of its prices for the option years.[91] The Comptroller General disagreed, stating that the Army's finding that a 15 percent variance constituted mathematical unbalancing was incorrect under the Comptroller's decision in Propserv Incorporated[92] In Propserv, the lowest bid in response to an Air Force solicitation for military housing maintenance services at Westover Air Force Base priced the basic contract term and 3 option years at $18,000, $14,000, $13,000, and

$12,000 respectively. In percentage terms, this amounted to a base/option period price differential of 27, 40, and 50 percent respectively. The low bidder had not offered any explanation as to why its bid contained those differentials and the government had not suggested any reasons. The Comptroller rejected the protester's claim that the low bid was mathematically unbalanced, stating:

> upon review of the bids, we do not find the difference in the prices contained in a Alliance's bid to be so great as to render the bid mathematically unbalanced.[93]

In IMI the Comptroller again used the term "windfall", opining that IMI's bid was not mathematically unbalanced because it would not receive a windfall if all options were not exercised.

In contrast to the Roan, IMI, and Propserv cases, consider the case of Crown Laundry and Dry Cleaners.[94] That case, decided by the Comptroller General in 1984, involved two Air Force solicitations for rental of washers and dryers, one at George Air Force Base, and one at Columbus Air Force Base. In response to both solicitations Crown had submitted heavily front-loaded bids as shown below.

George AFB Solicitation

Base Year	1st Option	2nd Option	Total
$65,152	$11,645	$11,645	$88,442

Columbus AFB Solicitation

$52,538	$12,888	$12,888	$78,314

The Air Force rejected both of Crown's bids as mathematically and materially unbalanced. Crown protested. The Comptroller denied the protest, refusing to consider Crown's business reasons for heavily front-loading its bids. Instead the Comptroller looked only at the fact that Crown's George AFB price for the base period was 459 percent higher than its option year prices and 70 percent higher than the prices submitted by the other offerors, and that Crown's Columbus AFB price for the base period was 308 percent higher than its option year price and 68 percent higher than the average base year price submitted by the other bidders.[94] The Comptroller General stated:

> Although Crown has offered business reasons for its price structure, we have consistently declined to look behind a bid to ascertain the business judgements that went into its preparation. See K.P.Food Services Inc., 60 Comp. Gen. 1 (1982), 82-1 CPD 289; S.F. & G., Inc., dba Mercury, B-192903, November 24, 1978, 78-2 CPD 361. Rather, we believe it is proper to determine whether unbalancing exists by focusing on the pricing structure and the services to be rendered.[96]

The Comptroller's approach in Crown Laundry is difficult to reconcile with the approach taken in Roan Corporation, discussed earlier. The Comp Gen sustained Roan's protest, upholding his bid which contained a price for the base period which was 1700 percent higher than its option year prices and 90 percent higher than the price submitted by Avis.[97] In Roan however, the Comptroller carefully examined the business reasons for this gigantic front-loading and concluded it was justified. Interestingly, the business reasons set forth by Roan and accepted by the Comp Gen were almost identical to those set forth by Crown and rejected. It is also interesting to note that the first case relied upon by the Comptroller above to support the proposition that he has "consistently declined to look behind a bid to ascertain business judgements" involved a bid where the differential between the basic and option years amounted to merely 5.8%. What the Comptroller actually said in S.F.& G was:

> We do not believe it is the function of our Office to look behind a bid to attempt to ascertain the business judgements that went into formulating a bid, where the difference between the portions of the total bid price is as slight as here.

This discussion isn't complete without reference to an additional case involving Crown Laundry. In 1982, the year before Crown Laundry and Dry Cleaners was decided, Crown had responded to an Army IFB for rental of washers and dryers at Fort Bragg. The name of the case was Solon Automated Services, Inc.,[98] In that case the protestor (Solon), and Crown submitted the following bids:

	Base Year	1st Option	2nd Option	Total
Crown	$674,992	$128,277	$108,501	$911,769
Solon	$313,518	$319,284	$290,498	$923,301

The Army awarded the contract to Crown. Solon protested. The

Comptroller sustained the protest, finding that Crown's bid was mathematically unbalanced because Crown had failed to show through adequate documentation that their bid reflected the actual costs.[99] In other words, Crown had failed to present adequate business reasons evidence and therefore lost the award. The next year when Crown again became involved in a protest, armed with the teaching of *Solon*, it sought to present evidence of business reasons but found the Comptroller uninterested.[100] Thus Crown lost again, not because he couldn't substantiate legitimate business reasons for the heavy front-loading, but because he wasn't given the opportunity to present them.

Inspite of the Comptroller Generals' decision in *Crown Laundry and Dry Cleaners*, the determination of whether a bid is mathematically unbalanced must include atleast some inquiry into the business reasons behind the apparently unbalanced bid. If there are valid business reasons and the unbalanced bid isn't just an attempt to get a windfall advance payment, then by definition, the bid for the basic period was not enhanced and the bid should not be considered unbalanced.

The Comp Gen set forth an interesting analytical framework in his recent decision in *Howell Construction, Inc.*,[101] *Howell* involved an Air Force solicitation for painting services at Keesler Air Force Base. The IFB contemplated the award of a contract for a 5-month base period with two 1-year options, and provided that options would be evaluated at the time of award. The solicitation also contained the standard warning that materially unbalanced bids might be rejected.[102] The three lowest bids and the government estimate are shown below.

	Base	1st Option	2nd Option	Total
Howell	$253,692	$497,816	$269,181	$1,020,690
Fasco	199,200	452,783	457,095	1,109,078
Evco	286,536	668,309	605,417	1,560,263
Govt Est	241,960	590,796	608,838	1,441,594

Fasco protested to the Air Force that Howell's bid should be rejected as materially unbalanced. The Air Force concurred and rejected the bid. Howell then lodged a protest which was denied by the Comptroller under the following analysis:

> Although there may be certain pricing variables depending on the nature of the procurement, a bid will be <u>questioned</u> if, in terms of the pricing structure among the base and option periods, it is neither internally consistent nor comparable to the other bids received. Thus, a large pricing differential existing between the base and option periods, or between one option period and the other, is itself <u>prima facie</u> evidence that the bid is mathematically unbalanced.[103]

The Comptroller then used this approach in determining that Howell's bid was mathematically unbalanced. He considered Howell's business reasons but found them of insufficient weight to overcome the presumption outlined above.

The best approach to use in determining whether a bid is mathematically unbalanced consists, therefore, of the following steps:

Step 1. Is the pricing structure of the base and options internally inconsistent?

Step 2. Is the pricing structure different than that of the other bids received?

Step 3. If the answer to either question 1 or 2 is yes and the differential is significant, then a presumption arises that the bid is mathematically unbalanced. This presumption of law is sufficient to sustain a determination of mathematical unbalancing unless and until it is overcome by evidence of legitimate business reasons.

Step 4. The business reasons, if presented, will be examined to see if they are of sufficient weight to overcome the presumption of unbalancing. The bigger the differential, or the more unbalanced the bid, the more difficult it will be to overcome the presumption.

b. Material Unbalancing

Once it is determined that a bid is mathematically unbalanced by applying the analysis outlined above, the second prong of the test involves a determination of whether the bid is also materially unbalanced. The test for material unbalancing is generally stated as whether there exists reasonable doubt that award would result in the lowest ultimate cost to the government.[104] Historically, the contracting officer has been granted a significant amount of lattitude in determining whether this "reasonable doubt" exists.[105] Prior to 1982 the Comptroller General seemed to take the view that as long as the government has a known requirement and is reasonably certain funds will be available to exercise the options, the bid could be accepted. The 1979 case of Reliable Trash Service[106], is a good example of this philosophy. That case involved an Air Force solicitation for refuse collection at Robins Air Force Base. The contract was to be for a 3-month basic term plus 3 additional 1-year options. The Air Force evaluated the offers and made the award to Peach State. Reliable protested on the grounds that Peach State's bid was materially unbalanced. The bids submitted by Peach State and Reliable are shown below.[107]

	Basic	1st Option	2nd Option	3rd Option	Total
Peach	$295,415	530,468	277,904	275,904	$1,379,691
Reliable	$113,351	453,404	453,404	453,404	$1,473,563

Reliable argued that Peach State had front-loaded the basic three-month period and the first option period. The Comptroller General denied Reliable's protest, finding that although the bid was mathematically unbalanced, since the Air Force had a known requirement for refuse collection and was reasonably certain funds would be available, there was not reasonable doubt that award to Peach State would result in the lowest ultimate cost to the Government.[108]

Another good example of the Comptroller's pre-1982 approach can be seen in K.P. Food Services[109], a 1980 Navy case which involved a solicitation for mess attendant services. Although the low bidder had front-loaded the basic period by $182,871 and his overall bid would not become low unless both of two option periods were exercised, the Comp Gen allowed acceptance of the unbalanced bid because "the record shows the requirement for mess attendant services is certain to exist during the option period and that there is a reasonable expectation that funds will be available to exercise those options because of the nature of the service involved."[110]

In Lear Siegler,Inc.[111], decided in 1982, a new rule was stated. There the Comptoller General held that even if the Government agency expects to exercise the options and funds are available, a bid will be found to be materially unbalanced if the cost advantage associated with the mathematically unbalanced bid will not be realized by the Government until well into the final option year. The facts in Lear Siegler are very interesting. The Army solicited bids for operation of the motor pool at Fort Bragg. The contract was to be for a base period of 6 months plus 3 option periods, the first two for 12 months and the last one for 6 months.[112] The relevant bids were as follows:

(prices are stated in terms of dollars per month)

	Base	1st Option	2nd Option	3rd Option	Total
SAE	$275,185	$97,586	$80,920	$80,920	$4,150,341
LSI	$127,337	$116,054	$115,834	$116,972	$4,248,510

The Army determined that SAE's bid was materially unbalanced because "the magnitude of enhancement of the first period makes it apparent that acceptance ...would not result in the lowest ultimate overall cost to the Government."[113] SAE then filed a protest with the GAO and also brought an action in Federal District Court at which point the Army sounded retreat and redetermined that SAE's bid was not unbalanced after all given the needs and funding expectations of the Government. LSI then protested. The Comptroller granted the protest, finding that inspite of the fact that the Army expected to exercise the options, in view of SAE's front-loaded bid structure and the fact that it would not be until well after the exercise of the third option year that the bid actually becomes low, there is reasonble doubt that award to SAE would result in the lowest ultimate cost to the Government.[114]

The following table illustrates how the Lear Siegler test has been applied in subsequent major cases.[115]

Case	Months Performance including options	When Bid Became Low	Outcome
Solon Automated Services	36	36th month	rejected
International Shelter Sys.	36	36th month	rejected
Crown Laundry	36	36th month	rejected
Crown Laundry	36	28th month	rejected
USA Pro	36	26th month	rejected
Jimmy's Appliance	34	14th month	accepted
TLM Berthing	60	42nd month	accepted

Thus it appears that where the government will not realize the cost advantage represented by the bid in question until the last, or nearly the last, month of performance the Comptroller will find the requisite reasonable doubt even though the government has a firm requiremnt for the options, fully expects to exercise them and is reasonably certain that funds will be available. If, on the other hand, the cost advantage offered by the low unbalanced bid is realized relatively early in performance, the Comptroller will not find the bid to be materially unbalanced.

4. Remedies

a. Rejection/Cancellation

The Comptroller General generally takes one of two approaches in response to unbalanced bids. If the solicitation contained the appropriate warning (FAR 52.217-5) that materially unbalanced bids could be rejected as non-responsive, the Comptroller will require rejection of the unbalanced bid and award to the next low balanced bidder.[116] If the solicitation failed to warn bidders that materially unbalanced bids could be rejected, the Comptroller General has required cancellation of the IFB or contract and re-solicitation.[117] The U.S. District Court for D.C. required cancellation of the contract and re-solicitation in a case where the solicitation did contain the proper warning but the Navy nevertheless accepted the unbalanced bid, finding the procurement procedure so tainted that resolicitation was the only proper remedy.[118]

In most cases the remedy of rejection or cancellation is the wrong answer. In an era of increasingly tight budgets the practice of rejecting a low unbalanced bid is akin to using an elephant gun to shoot a flea off the back of your loyal dog. It certainly takes care of the flea but you lose your pet in the process. We likewise do away with the problem of an unbalanced bid, but lose our low bidder in the process.

There are better ways to deal with unbalanced bidding than merely giving the government the right to reject the bid. These will be discussed in the following material.

b. Level Pricing

The FAR allows the solicitation to require that option prices be no higher than the price for the base period with the caveat that award can be made to bids with higher option prices as long as acceptance doesn't prejudice any other offeror.[119] Use of this level option pricing provision (LOPP) is helpful in preventing unbalanced bids for additional option quantities. In Numax Electronics Incorporated[120] the solicitation contained a level option pricing provision. Numax, however, submitted a bid which contained option prices which, although equal to the price for the base quantity when the same quantity was ordered, increased for progressively smaller increments of the option quantity. They bid $1,710 per unit on the base quantity of 1,522 units. For the option quantity, they bid a range per unit of from $1,710 if all 1,522 option units were ordered to $2,576 per unit for progressively smaller increments of the option quantity. The Comptroller upheld rejection of Numax's bid because its price was higher than the lowest unit price for the base quantity if the Army were to order less than the base quantity.[121] The Comptroller has had no difficulty finding that bids which violated the LOPP prejudiced other bidders.[122]

Use of level option pricing provisions enables the government to make an award based on evaluation of only the basic period with the assurance that the bidders have not inflated their option prices and bid nominal prices for the base period in an effort to win the award. It works well in situations where the option units are essentially identical to the basic unit and only the basic period need therefore be evaluated. Although a bidder would still be able to front-load his bid even with the existence of an LOPP, there is little incentive to do so when only the base period is evaluated.

c. Prohibition of Nonrecurring Costs in Option Prices

Another method of attempting to prevent unbalanced bids which is particularly useful when only the base period is evaluated involves the prohibition of nonrecurring costs in the option period prices. This prevents the bidder from offering a nominal base period price while shifting his startup costs to the option periods. The Comp Gen, however, may have undermined this method by its decision in Hitachi Denshi America,Ltd.[123] In that case the solicitation contained the following clause which prohibited offerors from including in the price for option quantities any costs of a startup or nonrecurring nature:

> "The bidder/offeror may indicate in the space provided below, the unit price(s) for the increased quantities. The bidder/offeror agrees not to include in the price for option quantities any cost of a startup or nonrecurring nature..."[124]

The solicitation also provided that if an offeror entered no price for the option quantity, the price stated for the basic quantity would apply.

Tektronix bid $893 per unit for the basic quantity and did not insert a price for the option quantities. The Army therefore used the $893 basic quantity price in evaluating Tektronix's bid for the option quantity. The Army made the award to Tekronix as the low bidder. Hitachi protested on the grounds that, since Tektronix's option price was the same as the basic quantity price, the option quantity price must contain nonrecurring costs in violation of the solicitation terms. The Comptroller General denied the protest, finding that since the solicitation didn't require submittal of a price breakdown, it was possible that due to inflation and the 5-year contract length the option prices could be as high as, or higher, than the basic period price.[125]

Thus, atleast with regard to awards made using sealed bidding (and this is the only area where unbalanced bidding should be a problem), the Comptroller's willingness to allow option period prices to be equal to the base period price when a possibility of inflation, etc, exists, makes this method of preventing unbalanced bidding fairly impotent. I do believe, however, that in Hatachi the Army set themselves up for a fall by specifically allowing the base period price to be used as the price for the option periods as well, thereby tacitly agreeing to allow nonrecurring costs in option prices. The Comptroller may decide differently if the bid was materially unbalanced as compared to the bids of other offerors and the solicitation was consistent in prohibiting nonrecurring costs in the base period price.

d. Discounting to Present Value

The best method for dealing with unbalanced bids in option contracts would be to discount all option period prices to present value. Experts agree that this would remove the incentive for bidders to front-load their prices in order to obtain the free use of money in the early years.[126] As stated by the Comptroller in Linolex Systems, Inc.[127]:

> "The reason for the use of present value method (PVM) is that in making the determination...the time value of money must be considered. It is necessary to determine present value because money has earning power over time. A dollar received today is worth more than a dollar received next year and, conversely, to postpone

spending a dollar until next year gives one the opportunity to earn interest on that dollar or otherwise productively use if for the one-year period."[128]

While the FAR is silent on the use of the PVM in evaluating bids containing option prices, it is interesting to note that the Government does use this method in evaluating ADPE procurements under the guidelines contained in the Federal Information Resources Management Regulations.[129]

A case illustrative of the use of the PVM method of evaluation is Salon Automated Services[130]. In Salon, the Army solicitation specified that bids would be evaluated by multiplying the base year monthly price by 11.115599670, multiplying the first option year monthly price by 9.635495047, and multiplying the second option year monthly price by 8.3524686, thus discounting for the cost of money at an annual rate of 14-3/8 percent. Lets look at the before and after effects of applying the PVM to the bids in that case.[131]

Before Applying PVM

	Crown	Salon
Base Year	$914,500	$338,052
First Option Year	199,058	397,152
Second Option Year	194,433	416,852
Total	$1,307,991	$1,152,056

After Discounting for Present Value

	Crown	Salon
Base Year	$848,127	$313,518
First Option Year	160,546	319,284
Second Option Year	135,795	290,300
Total	$1,144,471	$923,300

Total Difference	$1,307,991	$1,152,056
	-1,144,471	923,300
	163,236	228,756

Of interest is the fact that the whereas Crown's unbalanced bid decreased by only $163,236 after discounting for present value, Salon's bid which wasn't unbalanced decreased by $228,756. This illustrates how applying the PVM removes much of the incentive for a bidder to front-load his bid.

Thus we can see that use of remedies such as the level option pricing provision, the prohibition of nonrecurring costs in option prices, and especially the present value discounting method are desireable alternatives to the general practice of merely warning bidders that a materially unbalanced bid may be rejected and then throwing out the baby with the bathwater.

B. Multi-year Contracts

The tests, definitions and rules for mathematical and material unbalancing discussed above in connection with option contracts also apply to multi-year procurements. Multi-year contracts involving firm requirements for a definite duration have, however, been somewhat less susceptible to unbalanced bidding. This is because, first, the vast majority of procurement funds are limited by statute to obligation during the fiscal year in which the contract is executed which means that the total number of multy-year contracts is relatively small; second, due to the complexity of most multi-year procurements, they will be awarded using negotiation procedures instead of sealed bidding and indeed only a true idiot would accept a materially unbalanced bid in the context of a negotiated procurement; and third, the ASPR, DAR and now the FAR contain a fairly detailed set of solicitation and award criteria for multi-year procurements, among which are requirements for separate pricing of nonrecurring costs, a provision that the unit price of each item or service in the multi-year requirement be the same for all program years (level unit price) included,[132] and evaluation requirements which compare the unit costs under a multi-year arrangement with what they would be under a single year contract.[133]

Strangely enough, the issues regarding unbalanced bidding in multi-year contracts arise in connection with the disregard by bidders of the above stated FAR requirments.

The landmark case in this area is <u>Keco Industries, Inc.</u>[134] which involved a Navy multi-year solicitation for mobile air conditioning units. Section D of the Special Evaluaton Factors contained in the solicitation specified that the unit price of each like item was to be the same for all program years included. The following bids were received:

	Unit Price 001	002	003	004
Keco	$43,523	*	$41,694	$41,694
AAF	49,900	43,940	49,900	49,900
ACL	50,868	58,193	50,868	50,868
UAP	89,992	27,610	89,992	89,992

*Keco indicated in its bid that costs of item 002 were included in item 001

(Items 001,003,and 004 were air conditioning units, item 002 was tech data)

After an agency-level protest by AAF.the Navy rejected Keco's bid as non-responsive for non-compliance with the level unit pricing requirement. Keco protested. The Comptroller General sustained Keco's protest and enunciated a new rule for multi-year unbalanced bidding cases which was analogous to the rule used in option contracts. The Comptroller stated that in accordance with the philosophy applied in single year procurements with option provisions the new rule would be that deviations from the level unit pricing requirement would only cause rejection of the bid if the deviation worked to the prejudice of other bidders for the award.[135] The Comptroller found the spread between Keco and AAF to be so significant that he was convinced that even had AAF been permitted to bid in the manner Keco did, it would not have been low. He also analyzed the impacts of a contract cancellation after each year and determined that in the event of a cancellation after any year, Keco would still remain the low bidder.[136]

This means that the regulatory unit pricing requirements imposed on multi-year contracts by the FAR are viewed more or less as informalities which will be waived in the absence of prejudice to other bidders. In addition to the "prejudice to other bidders test" the Comptroller has overlayed the traditional two-prong mathematical and material unbalancing test to this area. Thus in Peach State Sanitation, Inc.[137], which involved a bidder who deviated from the solicitation's level unit pricing requirement, the Comp Gen first looked to determine if there was prejudice to other bidders, then applied the traditional mathematical and material tests to determine if the bid was unbalanced.

The methods currently employed by the FAR for preventing unbalanced bidding in multi-year procurements (ie. level unit pricing, segregation of nonrecurring costs, and comparative evaluation) seem to be working fairly well. As long as non-recurring costs are separately identified and unit prices are kept level, there shouldn't be much opportunity for unbalanced bidding in the mult-year arena. However, in cases where bidder(s) have deviated from FAR requirements, the use of the discounting to present value method could be useful in determining whether prejudice exists. In fact, one might even suggest that we could dispense with most of the regulatory constraints if present value discounting was used in the evaluation of multi-year bids. The incentive for bidders to unbalance their bids would be greatly reduced by considering the time value of money in the evaluation process. (see discussion of present value discount method discussed above at paragraph 4d.)

CHAPTER FOUR

PERFORMANCE ISSUES

While previous chapters have focused on unbalanced bidding at the front end of the contractual process, this chapter will deal with issues relating to unbalanced bids which arise during contract performance. Four principal issues have arisen in this context. They are: first, will liquidated damages be considered as a penalty when they are calculated based on an unbalanced unit price; second, what are the consequences of either a formal or constructive change by the Government in an attempt to remedy the effects of an unbalanced bid; third, what happens when the Government decides to terminate all or part of the contract for convenience in an attempt to avoid paying the inflated portion of the unbalanced bid price; and fourth, what are the consequences when a contractor who has submitted an unbalanced bid seeks to take advantage of the availability of progress payments?

A. Liquidated Damages

The use of liquidated damages in order to motivate contractors to perform on time is a widespread practice in government contracting, not unlike the private sector.[138] In fact the same general rules that apply to their use and enforcement in private contracting also apply in the public contracting arena.[139]

The Federal Acquisiton Regulation sets forth the following general policy guidance regarding the use of liquidated damages:[140]

> Liquidated damages clauses should be used only when both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damage clause in a contract, the contracting officer should consider the probable effect on such matters as pricing, competition, and the costs and difficulties of contract administration.
>
> The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages

may be held to be a penalty, and therefor unenforceable.

In addition, the DOD FAR supplement makes the use of liquidated damages mandatory in most construction contracts.[141]

Government contract case law also closely parallels the private sector common law in this area. In Lauhoff Grain Company[142], the AGBCA summarized the analysis to be applied in liquidated damage cases as follows:

> It is a well established rule that a provision for liquidated damages will be regarded as valid, and not a penalty, and will be upheld if, at the time it was written the following three conditions existed: (1) the damages to be anticipated from the breach are uncertain in amount or difficult to ascertain, (2) there was an intent by the parties to liquidate them in advance, and (3) the amount specified is reasonable and not greatly disproportionate to the presumable loss or injury.[143]

Although these rules appear to be fairly cut and dried, applying them to a specific fact situation is seldom easy. Hence their use invites substantial judicial intervention.[144]

The situation becomes even more complex where unbalanced bidding is involved. What happens, for example, when the amount of liquidated damages to be assessed is calculated by muitiplying a unit price, which turns out to be unbalanced, by a given factor? The net effect will be that the liquidated damage amount will be unbalanced to the same degree that the unit price is unbalanced. This was the situation faced by the Board in the "Sugar Pine" case[145], decided in 1982. There the contractor had unbalanced his bid in a Forest Service timber sale contract by grossly inflating his price for the sugar pine tree in response to a solicitation where award would be made on the basis of the highest total bid for all the species.[146] Whereas the Government's advertised rate for the Sugar Pine was $51.44 per board foot, Ericksen, the contractor, bid $840.00 per board foot[147], thus gambling that the Government's estimated volume of sugar pine board feet was overstated. He planned to purchase the bulk of the timber composed of other species for a nominal amount while still having the high bid overall. (Incidentally, the Forest Service lost nearly two million dollars due to this type of skewed bidding and has recently taken steps to prevent it)[148] All was going according to plan for Ericksen Lumber in the "Sugar Pine" case until they made the mistake of cutting a reserve tree which happened to be a sugar pine. The liquidated damages provision contained in the contract called for liquidated damages to be calculated by doubling the bid price for the species wrongfully cut and then adding another $500.00. Due to Ericksen's extremely inflated price for the sugar pine, the total liquidated damage figure for cutting the one reserve tree came to $40,304.25.[149] Ericksen contended that this represented a penalty and was therefore invalid as a liquidated damage.

The Board applied the standard 3 prong analysis outlined in the Lauhoff case above. They found no dispute with the first two prongs. Because the reserve tree was a memorial to Jon Pratter who had spent time at the tree prior to his death,[150] the ascertainment of damages was difficult. The Appellant, Ericksen, was a knowledgeable bidder for Forest Service Timber who understood the method used for calculating liquidated damages and had an intent to provide for them.

The issue therefore boiled down to whether the amount was reasonable and not greatly disproportionate to the presumable loss or injury. The Board held that since Ericksen itself, by its manner of bidding, set the amount, it could not have been meant as a penalty by the Government. Evidencing a reluctance to let the contractor who submitted an unbalanced bid have his cake and eat it too, the AGBCA concluded that the appellant "openly bargained" with the Forest Service for the amount assessed at the time of entering into the contract and would not be excused.[151]

This "assumption of risk" theory appears to make sense and will likely be applied in future cases where a contractor assumes the risk of paying disproportionately high liquidated damages by submitting a disproportionate (unbalanced) bid.

B. Change Orders/Equitable Adjustments

Can a government contracting officer accept an unbalanced bid and then subsequently, through the use of either constructive or formal change orders, seek to prevent the contractor from obtaining the benefit of his bargain?

1. Constructive Changes

An excellent example of an attempt by the Government to prevent a contractor from capitalizing on his unbalanced bid is seen in the case of <u>John Murphy Construction Co.</u>[152] That case, decided by the AGBCA in 1979 involved a contract for the construction of flood water retarding structures in the American Southwest desert. John Murphy Construction, the Appellant and successful bidder, had obtained the award on the basis of an unbalanced bid. By grossly inflating his bid price for Bid Item No. 2, Clearing and Grubbing, the contractor was entitled to receive what would have been equivalent to a huge advance payment[153]. In order to prevent the contractor from receiving this advance payment, the contracting officer revised the contractors previously approved schedule of operations which called for the contractor to clear and grub the entire borrow area before any borrow was taken from it. Under the revised schedule the borrow was released in phases to the contractor for clearing and grubbing,[154] the net effect of which was to prevent completion of Bid Item No. 2 until well into contract performance. The Appellant filed a claim with the contracting officer for an equitable adjustment based on a constructive change. The contracting officer denied the claim, finding the contractor was not justified receiving the price for Bid Item No.2 until it had given the Government sufficient value for its money.[155] The AGBCA held for the Appellant, finding the existence of a constructive change order entitling the contractor to an equitable adjustment. The Board stated:

> The fact that Appellant's bid was unbalanced did not constitute justification for the Government to interfere with Appellant's planned Sequence of Operations... When a contractor's planned schedule of work is interfered with or revised by the Government for its benefit and convenience, in a manner not required by the contract, it must be treated as a unilateral constructive change order.[156]

The amount of recovery given the contractor in the Murphy case is significant. As stated by the AGBCA:

> Accordingly we conclude on the basis of the findings of fact herein that the borrow was improperly released and that Appellant is entitled to an equitable adjustment for any additional costs he can prove he incurred because of the crosshauls and overhauls required as a result of the Government's method of releasing the borrow.[157]

The measure of recovery in constructive change/equitable adjustment cases is always the actual cost impact on the contractor concerned.[158] Therefore, even though the Board finds that an Appellant is entitled to an equitable adjustment when the goverment seeks to prevent him from capitalizing on an unbalanced bid, it is significant that since the recovery will be based on actual additional costs incurred, it will not give him the benefit of his unbalanced bid price. In Murphy the contractor recovered a fraction of what he would have received had the government allowed him to finish the clearing and grubbing in the beginning and receive his grossly inflated bid price for that effort.[159]

It therefore appears that, based on the Murphy case, while the Government will not be allowed to have a completely free hand in preventing a contractor from realizing the benefit of his unbalanced bid, where the actual cost incurred by the contractor by reason of the government's actions will be small in comparison to the windfall which he would otherwise receive, the Government should consider performing whatever corrective surgery is necessary in order to ameliorate the effects of the unbalanced bid and then cheerfully pay the contractor for his additional costs incurred by reason of the corrective surgery.

2. Formal Changes

The year following the AGBCA's decision in Murphy[160] another unbalanced bid case came before them which also involved the construction of flood water retarding structures in the Southwest desert. This case was Richard P. Murray, Inc.[161]. While it was an unbalanced bid case, it differed from the Murphy case discussed above[162] because here the Government sought to prevent the contractor from capitalizing on his unbalanced bid by issuing a formal unilateral deductive change order to the contract. In response to a solicitation which called for bids on a cubic yard of cement basis the Appellant submitted the following winning bid:[163]

Bid Item	Price/cubic yard
207	$500.00
208	60.00
307	500.00
308	60.00
407	500.00
408	60.00

Items 207, 307, and 407 called for the construction of formed concrete cradle and anti-seep collars for the principal spillway conduit using class 4000 concrete having a minimum compressive strength of 4000 pounds per square inch. Items 208, 308, and 408 called for the construction of subgrade slabs for the spillway outlets and the baffled chutes using class 2500 concrete having a minimum compressed strength of 2500 pounds per square inch. [164] Murray had grossly inflated his bid price for the class 4000 projects because he estimated they would require a much larger amount of cement than the class 2500 projects. He offered a nominal price for the class 2500 cement in order to win the award. Price comparison with similar projects indicated that a reasonable price would have been around $300 per cubic yard (alittle less for class 2500 and and little more for class 4000).[165]

The government, in an attempt to prevent Murray from realizing a windfall on his unbalanced bid, made a deductive change decreasing the weight of the concrete to be used for items 207, 307, aand 407 to class 2500. They then sought to pay him the price he had bid for class 2500 cement which was $60.00 per cubic yard.[166] This would have meant a savings of nearly $50,000 to the government. The contractor, on the other hand, claimed that he was entitled to his contract price for items 207, 307, and 407, which was $500 per cubic yard of cement minus only the difference in material cost which was $4.00 per cubic yard. He therefore claimed to be entitled to $496.00/cubic yard for Items 207,307 and 407.[167] The Board granted summary judgement for the Appellant and made the following statement:

> A contractor will not be allowed to use an equitable adjustment as a way to obtain reformation of the contract when he has made an improvident bid or a unilateral mistake in making the contract....Conversely, the Government cannot use the Changes clause and the equitable adjustment provided for

> therein as a means of seeking reformation of the contract in order to neutralize an unbalanced bid or correct a mistake in the estimated amounts in the bid schedule. It is apparent in this case that the compelling reason for the change order was to avoid having to pay the price bid on the three items of class 4000 concrete. It is also apparent that approval to substitute the lower priced concrete was given by the design unit based on that consideration alone...[168]

The contractor was therefore allowed the benefit of his bargain even though in so doing he would be capitalizing on his grossly unbalanced bid.

How can the outcome in Murray be reconciled with the outcome in Murphy, discussed earlier? Both cases involved attempts by the Government to erradicate the costly effects of an unbalanced bid. In Murphy, the Government was largely successful because the contractor received an equitable adjustment based on his true actual cost incurred while in Murray, the Appellant was successful in obtaining the full benefit of his unbalanced bid price. The answer involves the posture in which the cases came before the Board. The burden of proof with regard to reasonableness of costs shifts between the parties depending upon whether the government issued a formal deductive change order, or merely committed acts which altered the manner of performance and which form the basis of a constructive change order claim by the contractor. The Court of Claims stated this rule as follows:

> The Government has the burden of proving

> how much of a downward equitable adjustment in price should be made on account of the deletion of the original valves. Just as the contractor has that task when an upward adjustment is sought under the Changes clause, so the defendant has the laboring oar, and bears the risk of failure of proof, when a decrease is at issue.[169]

Thus it appears that in both Murphy and Murray the party who had the "laboring oar" failed to carry the burden of proof. And although the question of whether this outcome makes sense is beyond the scope of this paper, it does, however, point out some strategy considerations which both the government and the contractor should be aware of when an unbalanced bid has been accepted. The Government will want to avoid performing corrective surgery using a formal deductive change and the contractor should be intent on preventing the Government from making changes or alterations without using the formal change order mechanism.

C. Termination For Convenience

Whereas the Changes clause may be used in an attempt to ameliorate the effects of unbalanced bidding by changing the method of performance or revising the specifications, major deletions of work must be accomplished under the Termination for Convenience clause.[170] This clause, found at FAR 52.249-2 states:

The Government may terminate performance of work under this contract in whole, or from time to time, in part if the Contracting Officer determines that a termination is in the government's interest.

1. Effect of Termination for Convenience

This provision is perhaps the most unique in Government contracting.[171] It gives the Government an extremely broad right to escape from the contract and limits the contractor's recovery to costs incurred, profit on work done and the costs of preparing the termination settlement proposal. Recovery of anticipated profits is precluded.[172]

An agency which finds itself in the position of having accepted an unbalanced bid may be tempted to terminate the contract, either completely or partially, in order to keep the contractor from realizing a windfall profit. Termination for convience is appealing to the Government because the contractor is due only an equitable adjustment which is not based on the contract price. For example, if the entire contract were terminated, the contractor is only entitled to receive his costs incurred plus a fair and reasonable profit on work done. [173] This could be substantially less than his inflated bid price. If, on the other hand, the contract is only partially terminated the contractor is only entitled to an equitable adjustment for the increased costs of the remaining work.[174] The burden of proving increased costs is on the contractor.[175] This could also serve to prevent realization of the intended benefits of an unbalanced bid. Even more unpalatable to an unbalanced bidder is the situation where a contract contains severable items because termination of a severable item of the contract requires no equitable adjustment whatsoever for the remaining items.[176]

The case of American Maintenance and Management Services, Inc.[177], decided by the ASBCA in 1974, illustrates the precarious situation faced by an unbalanced bidder who finds the enhanced portion of his contract terminated for convenience. This case involved a contract for janitorial services at Vandenberg Air Force Base in California. The solicitation called for submission of separate bids for two separate items of work to be performed. Schedule B covered cleaning of the Airmen dormitories; schedule C the Airmen transient quarters.[178] The award was to be based on the lowest overall cost with a possibility of multiple awards for lowest separately priced items. In order to insure themselves of getting the award for atleast one of the schedules, American submitted an unbalanced bid which contained a nominal price for schedule C work and an enhanced price for schedule B work.[179] Because both other bidders submitted all or none bids which were expressly prohibited by the IFB, American won the award for all schedules. After just one month of performance the Air Force issued a formal notice terminating for convenience the Schedule B work due to funding cutbacks.[180] The parties eventually worked out a settlement agreement for American's claim on Schedule B work actually performed, in addition however, American submitted a claim seeking an equitable adjustment for the increased cost of performing Schedule C, the non-terminated portion of the contract.[181] Under normal circumstances American would have been entitled to this additional equitable adjustment. The contract contained the standard termination for convenience clause which, in part, stated:

> If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.[182]

Notwithstanding the existence of this clause in the contract, the ASBCA refused to give American the additonal equitable adjustment it sought for the increased costs of performing the non-terminated portion of the contract. The Board found that American was not entitled to the equitable adjustment because the increased labor costs were not caused by the partial termination of a severable portion of the contract but rather by his unbalanced bid.[133] Hence, American's scheme backfired and it suffered a sizeable loss in performing the remaining portion of the contract.

2. Limitations on the Right to Terminate

Does the contracting officer have a totally unfettered power to surgically remove the cancerous part of the contract relating to the enhanced bid price through partial termination for convenience? Until a few years ago many would have answered yes.[134] Only where the contractor accomplished the nearly impossible by demonstrating bad faith (ie.specific intent to injure) by the contracting officer could the Government's decision to terminate be successfully challenged.[135] A Government motive to save public funds by ameliorating the effects of an unbalanced bid would not be conisidered bad faith. Hence the door was wide open for American Maintenance-type actions.

In 1982 the Court of Claims handed down the landmark Torncello[136] decision in which the Court refused to allow the Termination for Convenience clause to be used to avoid anticipated profits unless there had been some change in circumstances between the time of award of the contract and the time of termination. Torncello involved the situation where the government had awarded a requirements contract to Torncello but then subsequently purchased one type of work under the contract from a competing bidder at a cheaper price.[187] Although several Board decisions subsequent to Torncello have attempted to limit its holding to the specific facts of the Torncello case,[188] experts suggest that these decisions are too restrictive in that the basic purpose of requiring changed circumstances is to assure that the Government has entered into a real, not illusory, obligation at the time of contract award.[189]

Although the outer limits on the scope of the Torncello rule may still be in doubt,[190] there is little doubt that it would apply squarely to unbalanced bid cases where the motive to terminate was based on the Government's desire to save itself from a bad deal by removing the unfavorably enhanced portion of the previously accepted unbalanced bid. Indeed the Government's obligation could only be considered as illusory if they entered into a contract resulting from an unbalanced bid with the intent to excuse themselves from the unfavorable part of the bargain. Therefore only in cases such as American Maintenance [191] discussed above where there are legitimate changed curcumstances such as requirment changes or funding cutbacks can the Government use termination for convenience to ameliorate the effects of an unbalanced bid.

D. Progress Payments and Unbalanced Bids

The availability of progress payments allows an unbalanced bidder to capitalize on his bid by maximizing the amount of funds he can obtain early in performance. This is true especially in regard to a construction contract bid on a per unit price basis where the awardee has front loaded his bid by inflating the price of the first units and understating the price of the remaining units. The difficult issue in this regard is whether, by obtaining progress payments, the contractor has gone beyond merely engaging in bad business practice (from the Government's point of view) and is actually guilty of criminal conduct.

1. How Obtained

FAR Part 32 contains the basic rules governing the use of progress payments. The contracting officer generally may provide for customary progress payments equal to 80% of incurred costs in situations where the contractor will be unable to bill for the first delivery of products, or other performance milestones, for a substantial time (normally 6 months) after work must begin, and will make expenditures for contract performance during the predelivery period that have a significant impact on the contractor's working capital.[182] While progress payment rates are based on actual costs incurred for supply and service contracts, construction contracts base the payment on completion of work as measured by his bid amount for each unit of performance. [193] Payments are normally made monthly on the basis of estimates approved by the contracting officer which are based upon the bid amount attributable to the units of work completed. These estimates should be roughly equal to actual costs incurred except when based upon an unbalanced bid, in which case the contractor will receive far more than his actual costs incurred early in performance.

Progress payments are not self-executing. The contractor must apply for them using a Standard Form 1443.[194] And while the Government is responsible to perform both fiscal and physical supervision of the work in order to insure that the work being performed fairly supports the progress payments made, this oversight often involves no more than a comparison of the amount paid to date with the percentage of bid price attributable to the work performed to date. When the bid price is front loaded the Contracting Officer may not discover the huge disparity between the actual value of the work performed and the amount of unliquidated progress payments to date.

2. Relation to Unbalanced Bidding

In solicitations where progress payment provisions would be appropriate under the criteria outlined above (ie. long lead time until billing milestone) the availability of progress payments has the effect of allowing the contractor to get maximum money early in performance. His shroud of legitimacy will not be disturbed as long as no one questions the unbalanced nature of his bid. He is, after all, matching his progress payment requests with his percentage of completion based on the bid amount attributable to the units completed.

An issue exists, however, as to whether in submitting a request for progress payments based on a front loaded bid the contractor is actually making a false claim or a false statement to the Government. He is receiving the use of public monies before actually entitled to them. Does this make him guilty of some sort of wrongful appropriation? If so there are a lot of criminal unbalanced bidders (bids, not minds) out there.

As part of the SF 1443 submission the contractor is required to sign a certification which states in fine print, that all of the data submitted on the SF 1443 is correct (including the incurred cost data), that "the costs of contract performance have been paid or will be paid currently,...that the work reflected above has been performed, that the quantities and amounts involved are consistent with the requirements of the contract".[188] In order for a contractor who has submitted a front loaded bid to receive progress payments, he must calculate incurred costs as a percentage of the inflated amount which he bid for the front loaded units. While this figure may be close to the mark for balanced bids, it becomes fictional for a front loaded bid. A front loaded bidder also engages in fiction by certifying that the work associated with the reported incurred cost figures has been completed and costs paid. The work truly associated with the inflated bid amounts will not be performed until later in the contract.

The FAR specifically authorizes the ACO to make progress payments based upon the contrator's certification without first conducting an audit.[186] This encourages the kind of chicanery described above. The FAR does provide for post-payment audits, however, which are to determine whether there is reason to doubt the contractor's accounting and control system or his certfication.[187] Upon discovery of improper certification or control, the ACO is authorized to suspend or decrease payments, or increase the liquidation rate.[188] These administrative remedies are seldom used, however, and provide no deterent effect to future abuses of the progress payments system by an unbalanced bidder.

The civil False Claims Act[189], which carries a potential penalty of treble damages plus a $10,000 fine, may be violated when the contractor knowingly presents an

SF 1443 containing fictional cost incurred data based on an unbalanced bid. Although some courts have held that a specific intent to defraud the government is required in addition to the knowledge that the information submitted is false[200], the majority view seems to be that knowledge that the cost item submitted is false is sufficient for imposition of the fine.[201] While an unbalanced bidder who submits a request for progress payments based on a front loaded bid doesn't believe he is defrauding the Government because all he is doing is getting use of the money earlier than actually entitled, by presenting fictional incurred cost data based on his front loaded bid, he is possibly violating the Act. It would be difficult, however, to prove that the contractor violated the act knowingly since his method of estimating incurred cost data by calculating percentage of completion by relating the units completed to the amount bid for those units is accepted practice in the construction arena. And a contractor who negligently submitted false incurred cost data in his SF 1443 would not be in violation of the act.[202]

The criminal False Claims Act[203], which carries a fine of up to $1,000,000 and/or a prison sentence of up to 5 years, could also be violated if a contractor knowingly submits an SF 1443 containing false incurred cost data. All agree that no showing of specific intent is required.[204] The contractor must merely act with the knowledge that the claim is false.[205] Claim is defined under both the civil and criminal acts as any demand upon the Government for payment of money or transfer of property.[206] An contractor who requests progress payments using fictional incurred cost data based on a front loaded bid may be violating this Act as well but it will likewise be difficult to prove knowledge that the claim is false since calculation of percentage of completion by relating units completed to unit bid amounts is an accepted practice. Another circumstance that would discourage the bringing of criminal charges is the fact the Contractor is actually entitled to the money at a later point in time during the performance period (although he is not entitled to early use of the money).

By submitting a request for progress payments (SF 1443) which contains false incurred cost data, a contractor may have also violated the False Statements Act.[207] This act, which also carries a fine of up to $10,000 and/or a prison sentence of up to 5 years, is violated when the contractor knowingly and willfully makes a material false statement to the Government.[208] Violation of the act does not require reliance on the false statement by the Government.[209] Its scope is extremely broad, more so than the False Claims Act discussed above. The fact that the Contractor is only seeking to obtain funds ear' er than entitled would not affect applicability of this Act. If a contractor certifies that the incurred cost figures reported in his SF 1443 accurately reflect work performed when he knows they are based on front loaded unit prices, he has probably violated the act. Here, as with the False Claims Act, it will be difficult to prove a "knowing" violation in light of the accepted construction industry practice of estimating incurred cost on a percentage of completion basis. Another troublesome issue to a hopeful prosecutor would be the fact the the Contracting Officer has accepted the awardee's unbalanced bid and by so doing may have precluded a subsequent claim that the per unit bid amount does not reflect reality. Reality is the accepted contract price. The opportunity to complain may have vanished with acceptance of the front loaded bid.

CONCLUSION

This paper has presented a broad, indepth analysis of unbalanced bidding. The first chapter presented a general overview; the second chapter dealt with unbalanced bidding in multi-item procurements; the third dealt with multi-period procurements, and the fourth with performance issues. Present methods of dealing with unbalanced bidding were analyzed; new and better methods were proposed.

In the multi-item arena, the best method for dealing with the problem appears to be the single percentage factor method. Used properly, this method would preclude unbalanced bidding in multi-item contracts. The problems encountered by practitioners in trying to interpret and apply the overly mechanical GAO two-prong test would be alleviated.

In the multi-period arena, the best method of dealing with the problem appears to be the discounting to present value method. This would take the incentive away from contractors to unbalance their bids and relieve practitioners from attempting to apply the mechanical GAO tests to complex fact patterns.

In any event the GAO should take a hard look at their current eagerness to throw out the baby with the bathwater by cancelling solicitations, terminating contracts, and losing low bidders which results in increased expenditure of tax dollars.

From the standpoint of performance, contractors should take a close look at the method of calculating liquidated damages contained in the contract before submitting an unbalanced bid as they may find themselves paying inflated liquidated damages as victims of their own unbalanced scheme. If the Government wants to surgically remove the enhanced portion of the unbalanced contract, they should do it using actions which would amount to a constructive change entitling the contractor to an equitable adjustment thus placing the burden of proof on the contractor. Contractor's, on the other hand, should watch for such actions and insist the Government play it straight by formally issuing a deductive change order which places the burden of proof on the Government. As for Government attempts to terminate the enhanced portion of an unbalanced contract for convenience, Contractors should be aware that the Government will only be allowed to take such action if there are legitimate changed circumstances independent of the Government's motive to deprive the Contractor of the benefit of his unbalanced bargain. The area of progress payments adds additional factors to those which a contractor must consider before he submits an unbalanced bid. Particularly with regard to unit-priced construction contracts, an awardee who requests progress payments based on a front loaded bid may be guilty of violating federal fraud statutes. Although no one has ever been prosecuted for this particular offense, in today's environment of increasingly heightened scrutiny prosecution is becoming more and more likely.

FOOTNOTES

1. J. CIBINIC & R. NASH, FORMATION OF GOVERNMENT CONTRACTS (The George Washington University, 2d ed. 1986)

2. Porta-John Corporation, Comp. Gen. B-218080, 85-1 CPD 325 (1985)

3. Moffett, Hodgkins, and Clarke Co. v. Rochester, 178 U.S. 273 (1900)

4. Frank Stamato & Co. v. City of New Brunswick, 90 A.2d 34 (NJ 1952)

5. Id.at 36

6. FAR 52.217-5 is the only FAR clause which specifically deals with unbalanced bidding. It allow rejection of a materially unbalanced bid but does not define material.

7. 39 Comp. Gen. 185 (1959)

8. Jimmy's Appliance, Comp. Gen. B-205611, 82-1 CPD 542 (1982)

9. Command Systems, Comp. Gen. B-218093, 85-1 CPD 205 (1985)

10. Central Texas College, Comp. Gen. B-216388, 84-2 CPD 361 (1984)

11. Porta-John, supra, note 2

12. Impsa International, Inc., Comp. Gen. B-221903, 86-1 CPD 506 (1986)

13. Reliable Trash Service, Comp. Gen.. B-194760, 79-2 CPD 107 (1979)

14. Howell Construction, Inc., Comp. Gen. B-225766, 87-1 CPD 455 (1987)

15. Reliable Trash, supra, note 13

16. Howell, supra, note 14

17. Id. at 456

18. SMC Information Co., Comp. Gen. B-224466, 86-2 CPD 505 (1986)

19. Id. at 5

20. Impsa, supra, note 12

21. M&B Contracting Co.- Reconsideration, Comp. Gen. B-191786, 78-2 CPD 179 (1978)

22. Id. at 2

23. Riverport Industries, Inc., Comp. Gen. B-216707, 85-1 CPD 364 (1985); Request for Reconsideration, B-218656.2, 85-2 CPD 108 (1985)

24. FAR 23

25. Kiddie, Inc., Weber Aircraft Division, Comp. Gen. B-223935, 86-2 CPD 587 (1986)

26. Riverport, Supra, note 23

27. Id. at 3

28. Edgewater Machine & Fabricators, Inc., Comp. Gen. B- 219828, 85-2 CPD 630 (1985)

29. Nebraska Aluminum Castings, Inc., Comp. Gen. B-222476, 86-1 CPD 582 (1966)

30. Microtech, Inc., Comp. Gen. B-225892, 87-1 CPD 453 (1983)

31. Id. at 4

32. DAR Council Case Management Record, case no. 86-172, "First Article Test Pricing", November 17, 1986

33. Edward B. Friel, Comp. Gen. B-183871, 75-2 CPD 233 (1975)

34. All Weather Contractors, Inc., Comp. Gen. B-217242, 85-1 CPD 71 (1985)

35. Asphalt Service Co., Comp.Gen. B-227866, 87-2 CPD 151 (1987)

36. Id. at 2

37. Gulf Coast Defense Contractors, Inc., Comp.Gen. B-212641, 84-1 CPD 243 (1984)

38. Natural Landscape Contractors, Inc., Comp. Gen. B-209745, 83-2 CPD 32 (1983)

39. Reliable Reproductions, Inc., Comp. Gen. B-201137, 81-1 CPD 100 (1981); Cf. Allied Container Manufacturing Corp., Comp. Gen. B-201140, 81-1 CPD 175 (1981)

40. Relable Reproductions, Supra, note 39

41. M.C. General, Comp. Gen. B-228334, 87-2 CPD 572 (1987)

42. Price Brothers Co., Comp. Gen. B-228524, 88-1 CPD 180 (1988)

43. DAR Council Case Management Record, Supra, note 32

44. Price Brothers, Supra, note 42

45. Jacobellis v. Ohio, 378 U.S. 184 (1964)

46. Riverport Industries, Supra, note 23

47. 56 Comp. Gen. 107 (1976)

48. Id. at 108

49. Id. at 110

50. 52 Fed. Reg. 42700 (1987) (to be codified at 36 C.F.R. 223)

51. Comptroller General's Report to the Honorable Eugene A. Chappie, House of Representatives, GAO/RCED-83-37, Feb. 9, 1983

52. Id. at 8-9

53. 52 Fed. Reg. 42701 (1987) (to be codified at 36 C.F.R. 223)

54. GAO report, Supra, note 51

55. 41 U.S.C. 10 (1976)

56. FAR 25.105

57. Comp. Gen. B-195311, 79-2 CPD 397 (1979)

58. Id. at 5

59. Id. at 9-10

60. Chrysler Corp., Comp. Gen. B-182754, 75-1 CPD 100 (1975)

61. Id. at 6

62. Id. at 1

63. Comp. Gen. B-2133990, 84-2 CPD 32 (1984)

64. Id.
65. Id. at 2

66. Id. at 4

67. C. Preston, Air Force General Counsel Memorandum, "Statutory Cost Limitations", Jan. 28, 1983

68. Stamato, Supra, note 6

69. Oswald Brothers Enterprizes, Inc., Comp. Gen. B-180676, 74-1 CPD 238 (1974)
70. 79-2 CPD 397, Supra, note 57

71. Id. at 9-10

72. FAR 17.202(b)

73. Safemasters Co., Comp. Gen. B-192941, 79-1 CPD 38 (1979)

74. R. NASH & J. CIBINIC, Supra, note 1

75. FAR 17.206(b)

76. R&R Inventory Service, Inc., 54 Comp. Gen. 206 (1974)

77. Id. at 5

78. 6 Cl. Ct. 497 (1984)

79. Id. at 2

80. Id. at 4

81. FAR 52.217-5

82. Reliable Trash, Supra, note 13

83. USA Pro Co., Inc., Comp.Gen. B-220976, 86-1 CPD 159 (1986)

84. Id. at 2

85. Id. at 5

86. Roan Corporation, Comp. Gen. B-211228, 84-1 CPD 116

87. Id. at 5

88. Id. at 4

89. Id.

90. Comp. Gen. B-217016, 84-2 CPD 654 (1984)

91. Id. at 2

92. Comp. Gen. B-192154, 79-1 CPD 138 (1979)

93. Id. at 5

94. Comp. Gen. B-208795.2, 83-1 CPD 438 (1983)

95. Id. at 5

96. Id.

97. Roan, Supra, note 86

98. Comp. Gen. B-206449.2, 82-2 CPD 548 (1982). mot. for recon. den. B-206449.3, B-206449.4, 83-1 CPD 355 (1983)

99. Id. at 4

100. 83-1 CPD 438, Supra, note 94

101. Comp. Gen. B-225766, 87-1 CPD 455 (1987)

102. Id. at 2

103. Id. at 3

104. Microtech Industries, Inc., Comp. Gen. B-203473, 81-2 CPD 269 (1981)

105. R. NASH & J. CIBINIC, Supra, note 1 at 842

106. Comp. Gen. B-194760, 79-2 CPD 107 (1979)

107. Id. at 2

108. Id. at 5

109. Comp. Gen. B-198427.2, 82-1 CPD 289 (1982)

110. Id. at 6

111. Comp. Gen. B-205594.2, 82-1 CPD 632 (1982)

112. Id. at 2

113. Id. at 3

114. Id. at 6

115. Solon Automated Services, Inc., Comp. Gen. B-206449.2, 82-2 CPD 548 (1982); Cf. International Shelter Systems, Inc., Comp. Gen. B-218167, 85-1 CPD 549 (1985); see also Crown Laundry and Dry Cleaners, Inc., Comp. Gen. B-208795.2, B-209311, 83-1 CPD 438 (1983); see also USA Pro Co., Comp. Gen. B-220986, 86-1 CPD 159 (1986); Cf. Jimmy's Appliance, Comp. Gen. B-205611, 82-1 CPD 542 (1982); see also TLM Berthing, Comp. Gen. B-220623, 86-1 CPD 111 (1986)

116. TWI Incorporated, Comp. Gen. B-202966, 81-2 CPD 424 (1981)

117. Moore Services, Inc., Comp. Gen. B-204704.2, 82-1 CPD 532 (1982)

118. Solon Automated Services, Inc. v. United States, 658 F. Supp. 28 (D.D.C. 1987)

119. FAR 17.203(f)

120. Numax Electronics, Inc., Comp. Gen. B-206127.2, 82-2 CPD 317 (1982)

121. Id. at 3

122. Orlotronics Corp., Comp.Gen. B-200382, 81-1 CPD 308 (1981)

123. Comp.Gen. B-212925, 84-1 CPD 342 (1984)

124. Id. at 6

125. Id. at 7

126. R. NASH & J. CIBINIC, Supra, note 1 at 845

127. Comp. Gen. B-179047, 74-1 CPD 296 (1974)

128. Id. at 8

129. 42 C.F.R. 201-32.205-3 (1987)

130. Comp. Gen. B-206449.2, 82-2 CPD 548 (1982)

131. Id. at 2

132. FAR 17.103-2 (c) Cf. ASPR 1-322.2

133. FAR 17.103-3

134. Comp. Gen. B-183114, 75-1 CPD 301 (1975)

135. Id. at 4

136. Id.

137. Comp.Gen. B-2102223.5, 84-1 CPD 176 (1984)

138. J. CIBINIC & R. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS, (George Washington University, 2nd Edition 1986), p799

139. Priebe & Sons v. United States, 332 U.S. 407 (1947)

140. FAR 12.202

141. DFAR 12.204

142. AGBCA No. 75-120, 80-1 BCA 14192 (1980)

143. Id at 77067; see E.g., Sinder Lumber Products Co., AGBCA No. 78-171-5, 81-2 BCA 15218 (1981); accord E.g., George W. Higgs v. United States, 212 Ct. Cl. 146 (1976)

144. J. CIBINIC & R. NASH, Supra, note 138

145. Ericksen Lumber Co., AGBCA No. 80-196-5, 82-1 BCA 15544 (1982)

146. Id. at 77065

147. Id.

148. The Forest Service has recently adopted a percentage factor bidding system which is designed to eliminate the possibility of skewed bidding. See GAO report, Supra, note 54

149. Ericksen, Supra, note 145 at 77067

150. Id. at 77066

151. Id. at 77065

152. AGBCA No. 418, 79-1 BCA 13836 (1979)

153. Id. at 67869

154. Id. at 67870

155. Id.

156. Id. at 67869

157. Id. at 67870

158. The proper measure of an equitable adjustment is the cost impact on the particular contractor. see Lectro Magnetics, Inc., ASBCA 1597, 73-2 BCA 10112 (1973); Cf. Ensign-Bickford Co., ASBCA 6214, 60-2 BCA 3217 (1960)

159. John Murphy Construction Co., Supra, note 152

160. Id.

161. AGBCA 77-152, 80-1 BCA 1448 (1980)

162. John Murphy Construction Co., Supra, note 152

163. Richard P. Murray, Inc., Supra, note 161

164. Id. at 71212

165. Id. at 71214

166. Id. at 71213

167. Id.

168. Id. at 71218

169. Nager Electric Co., Inc. v. United States, 194 Ct. Cl. 835 (1971)

170. J. W. Bateson Co. v. United States, 308 F. 2nd 510 (5th Cir. 1962) is the leading case for the rule that major deletions may not be accomplished under the Changes Clause.

171. J. CIBINIC & R. NASH, Supra, note 138 at 817

172. FAR 49.201, 49.202, and 52.249-2

173. Id.

174. Id.

175. Askenazy Construction Co., HUDBCA No.78-2, 78-2 BCA 13402 (1978)

176. Gregory & Reilley Associates, Inc., FAACAP No. 65-30, 65-2 BCA 4918 (1965)

177. ASBCA no. 18348, 74-2 BCA 10781 (1974)

178. Id. at 51250

179. Id. at 51252

180. Id. at 51253

181. Id. at 51254

182. ASPR 7-103.21(b), Termination for the Convenience of the Government

183. American Maintenance, Supra, note 177

184. Under Sylvan Crest Sand & Gravel Co. v. United States,150 F. 2nd 642 (2nd Cir. 1945) the Government's right to terminate for convenience was almost unlimited. The court found consideration in the Government's implied promise to give reasonable notice of termination.

185. Kalvar Corp. v. United States, 211 Ct. Cl. 192 (1976) cert. den. 434 U.S. 830 (1977)

186. Torncello v. United States, 231 Ct.Cl. 20 (1982)

187. Id.

188. See E.g., Automated Services, Inc., DOTBCA No. 1753, 87-1 BCA 19459 (1987), where the Board held that Torncello was limitedto the specific case where an agency entered into a requirements contract with the specific intent of diverting work to a competing firm; also C.f. Drain-A-Way Systems, GSBCA No.7022, 84-1 BCA 16929 (1984)

189. J. CIBINIC & R. NASH, Supra, note 138 at 824

190. Mutual Leasing Corp. v. United States, 7 Ct. Cl. 43 (1984)

191. ASBCA No. 18348, Supra, note 177

192. FAR 32.502-1

193. FAR 32.103

194. FAR 53.301-1443

195. Id

196. FAR 32.503-5(b)(3)(ii)

197. FAR 32.503-5(b)(4)

198. FAR 32.503-6(a)(2)

199. 31 U.S.C. 3729 (1987)

200. United States v. Mead, 426 F. 2nd 118 (9tn Cir. 1970)

201. Acme Process Equipment Co. v. United States, 171 Ct. Cl.324 (1965) rev'd on other grounds, 385 U.S. 138 (1966)

202. United States v. Systron-Donner Corp., 486 F. 2nd 249 (9th Cir. 1973)

203 18 U.S.C. 287 (1987)

204. United States v. Irwin, 654 F. 2nd 671 (10th Cir. 1981)

205. United States v. Maher, 582 F. 2nd 842 (4th Cir.) cert. den. 439 U.S. 1115 (1978)

206. United States v. Tieger, 234 F. 2nd 589 (3rd Cir. cert. den. 352 U.S. 941 (1956)

207. 18 U.S.C. 1001 (1986)

208. United States v. Lichenstein, 610 F. 2nd 1272 (5th Cir. 1980)

209. United States v. Hicks, 619 F. 2nd 752 (8th Cir. 1980)

210. see. E.g., 10 USC 2306a (1988) which contains the cost and pricing data certfication requirment. The violation occurs through submission of defective cost or pricing data regardless of whether there is a certification. E.g.,